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Lectures

READINGS

DELIVERED BEFORE

THE HONOURABLE

Society of the Middle Temple,

IN THE YEAR 1850.

BY

GEORGE BOWYER, Esq., D.C.L.,

BARRISTER-AT-LAW,

LATE READER AT THE MIDDLE TEMPLE, AUTHOR OF COMMENTARIES ON THE CONSTITUTIONAL LAW OF ENGLAND, COMMENTARIES ON THE MODERN CIVIL LAW, A DISSERTATION ON THE STATUTES OF THE ITALIAN CITIES, ETC.

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TO

THE RIGHT HONOURABLE

JOHN LORD CAMPBELL,

BARON CAMPBELL OF ST. ANDREWS, IN THE
COUNTY OF FIFE,

LORD CHIEF JUSTICE OF ENGLAND,

A Deputy Speaker of the House of Lords,

AND ONE OF THE LORDS OF THE JUDICIAL COMMITTEE OF HER
MAJESTY'S MOST HONOURABLE PRIVY COUNCIL,
ETC. ETC. ETC.

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THESE READINGS

ARE,

BY HIS LORDSHIP'S PERMISSION,

DEDICATED AND INSCRIBED.

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PREFACE.

THE principal object of these Readings was to show the connection of the branches of Jurisprudence one with another, and their place in the general system of moral science, and, at the same time, to teach leading principles and classifications, important not only to lawyers, but also to all who are concerned in legislation and government. With these things I have combined a good deal of historical matter and legal learning, which is scattered about in various books, some of them not easily obtained nor usually read.

In the execution of this task, I have been careful to keep in view what is practical, avoiding vague generalities and mere hypothetical theories, and always citing authorities in support of the chief propositions and principles, so as to enable the reader to test what I have said, and pursue his researches further on any point that he may desire to investigate. And I have endeavoured to illustrate and explain our own national law by means of the greatest legal writers of other countries.

The general heads of the Readings will show that I have taken a sufficiently wide range. And even while treating subjects apparently of a confined nature, such as the Construction of Statutes, I have brought to bear on them the portions of various branches of jurisprudence scientifically connected with the particular matter in hand.

The course of Readings concludes with a general view of the whole system of the Canon Law, which did not previously exist in the English language. This subject is important, not only because the

Canon Law is the mother of the Queen's Ecclesiastical Law, and to a considerable extent part and parcel of the Law of England—which has also derived therefrom some of her own doctrines,—but also as a great and necessary branch of Universal Jurisprudence. I have been solicitous to treat this subject legally and scientifically, but not theologically, avoiding controversy, and giving, at the same time, a true general idea of the Canon Law considered as a system of rules defining rights and obligations, and containing a peculiar form of exterior Ecclesiastical polity.

Such are the principal features of these Readings, which I now submit to the public.

The Temple,
April, 1851.

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READINGS

DELIVERED BEFORE

THE HON. SOCIETY OF THE MIDDLE TEMPLE.

FIRST READING.

ON THE USES OF THE SCIENCE OF GENERAL JURISPRUDENCE, AND THE CLASSIFICATION OF LAWS.

I CANNOT perhaps more conveniently commence the performance of the duties intrusted to me, than by stating my views of the principles by which those duties should be regulated. I shall thereby show what use may be derived from my labours, and at the same time lay down a plan of my future course.

On the abstract question of the utility of lectures I shall say nothing, but proceed to describe the nature of the Readings, which are, in my opinion, required of me.

I might content myself with presenting to you mere explanatory treatises on different branches of our laws by a compilation of cases and other authorities. But however useful that course may be, I think that something more may be reasonably expected of me. The digests and text books which are accessible to every student seem, indeed, to render readings of that simple description far less requisite than they used to be before Blackstone set the example of bringing the law into a perspicuous and even an elegant form. And I do not suppose that readings or lectures can be made a substitute for the private and diligent study of those books.

It will, therefore, be my endeavour to give information which is not immediately within your reach, and to show how that information may facilitate or render more valuable the knowledge acquired in the ordinary course of legal training and practice. That this *can* be done I have no doubt. Whether *I* can do it time will show. I can only say that no endeavour shall be wanting on my part.

Some of the most distinguished men of our profession have long felt that the sphere of legal learning in England ought to be enlarged. It is indeed obvious that when other sciences are being augmented with the genius, the industry, the enterprise, the invention, and the intellectual fertility—not of one country, but of the whole civilized world—the science of law must fall below her high dignity if she be confined within the mere bounds of the practical daily necessities of the administration of justice. No human science is more noble, none more deserving of the widest and most liberal cultivation, without which its professors will hardly preserve their proper rank with regard to those of other sciences. Without this broad cultivation Municipal Law will become sterile and less able than it ought to be to meet all the exigences which changes, both social and political, and the progress of mankind must engender.

This is no doubt a topic of great practical importance in our days, when—partly from the natural course of the human mind, and partly from the great events which have lately agitated and convulsed the larger part of the civilized world—every institution of the country is narrowly scrutinized—every law is critically examined,—and a strong feeling has been awakened that improvement is requisite in many parts of our Municipal Law.

How are we to meet these exigences? How are we to defend those laws which ought to be maintained, and usefully reform those which require improvement? The country will not be satisfied with appeals to mere precedent, or the established rules of positive law. We must be ready to give reasons for the law, drawn from sound practical philosophy, convincing to the minds of acute, practical, and judicious men. We must appeal to principles of justice and public utility. And where the law requires amendment, it must be reformed on some broad and sound principles, which can be done only by the light and guidance of the science of jurisprudence. That science is the necessary guide of the legislator in the performance of his duty, because it suggests remedies for defects or omissions of the Municipal Law, and, by presenting a general and coherent system to his mind, enables him to preserve a unity in his work, without which it must be a sort of patchwork and a series of experiments.

In the administration of justice, by the combined services of the Bench and the Bar, we cannot fail to see the value of a broad cultivation of the science of jurisprudence. Cases frequently occur in our Courts, for the decision of which the precedents and books of authority afford insufficient or no rules. In such cases,—as the judges are always desirous of following the dictates of reason and substantial justice,—it must be a great advantage to an advocate to have at his

disposal the vast mine of equitable principles and legal reasoning to be found in the Roman Law and the writings of the jurists. And the science of jurisprudence must be most valuable to a judge, where he finds himself forsaken, or imperfectly assisted, by the guides on whom he is accustomed to rely.

One instance of a case of this description will suffice, though many could be cited; and, indeed, it might be shown that the difficulties attending the settlement of the rights and liabilities of shareholders and provisional committeemen would have been diminished by the assistance of the great civilians and jurists. I refer to the case of *Hammond* v. *Hall*, 10 Sim. 551.

The question raised in that case, on motion to dissolve an injunction, was, Whether the owner of an old well can prevent his neighbour from sinking a well on his own land, on the ground that thereby the supply of water to the old well will be drawn off or diminished. The case was argued by counsel of the greatest eminence; and I perfectly remember that there was a paucity of English authorities on the question in dispute. But there are principles in the Roman Civil Law (in the titles on the Aquilian Law, and De Regulis Juris), and in Grotius, b. ii., chaps. iii. and viii., which afford a solution of the difficulty most reasonable and just. And the reason of the law on the point is given very concisely by Ulpian, in the 26th Law of the title of the Pandects, "De Damno Infecto." He says, "Proculus ait cum quis jure quid in suo faceret, quamvis promisisset damni infecti vicino, non tamen eum teneri ea stipulatione."[a] And he gives as an instance the case of a man who prevents water from flowing from his land to that of his neighbour. The meaning of the passage is, that though a man be bound by the stipulation *damni infecti*,—that is to say, not to do anything to injure his neighbour's property,—yet he is not restrained from doing any lawful act incident to the enjoyment of his own property. And the very point in question, in the case of *Hammond* v. *Hall*, is decided accordingly by Ulpian, in the 1st Law, of the title of the Pandects, "De Aqua et Aquæ Pluviæ Arcenda." He says, "*Denique Marcellus scribit, cum eo qui in suo fodiens, vicini fontem avertit nihil posse agi.*" And, in the case of *Acton* v. *Blundel*, 12 M. & W. 353, the same doctrine was laid down in a similar case; and both the learned counsel at the bar, and the Lord Chief Justice Tindal, made great use of texts of the Civil Law and the writings of the commentators.

In the case of *Sutton* v. *Temple*, 12 Mee. & Wel. 52,—which was an action of assumpsit for the use of pasture land, and the eatage of grass thereon growing,—evidence was given that after the lessee had put in

[a] And see L. 25, § 12, ff. De Damno Infecto.

his cattle he discovered that the land was covered with refuse paint, which poisoned several of the cattle; but there was no evidence to show that the paint was put there by the plaintiff, or that she knew of its being on the land.

Now the very point is decided by the following Law of Ulpian, in the Pandects (L. 19, § 1, ff. Locati Conducti), "*Si saltum pascuum locasti in quo mala herba nascebatur: hic si pecora vel demortua sunt, vel etiam deteriora facta, quod interest præstabitur si scisti; si ignorasti, pensionem non petes.*" This text should have been cited, and no one can doubt that it must have had considerable weight with the judges, if it had been brought under their consideration.

Here we have practical instances of the use of looking for legal knowledge beyond our own books. In doubtful cases the judges are glad to be furnished by counsel with this species of learning. And in all cases where the Court is not absolutely bound by authorities, but is required to exercise a more or less extended judgment, a knowledge of the science of jurisprudence must be very valuable to show what may be the effects of laying down a particular doctrine, and how it will work with the system of the branch of law to which it belongs.

Lord Mansfield, that great master of jurisprudence, was the principal founder of our Commercial Law—and especially of our Law of Insurance, and it is easy to perceive that his decisions were framed with reference to a system of jurisprudence, and not merely on consideration of the particular case.

Some even of our greatest judges have, perhaps, shown in their decisions the defects of the exclusive nature of English legal education, which has until lately been too much confined to the study of our own Municipal Law. An instance of this is to be found in the case of *Le Neve* v. *Le Neve*, 1 Ves. 64; where Lord Hardwicke held, that if a deed respecting lands in any of the register counties is not registered, and afterwards the same lands are sold or mortgaged by a deed properly registered; if the person claiming under the second deed has notice of the first deed, the person claiming under the first deed, though it is not registered, shall be preferred to him. Mr. Butler, in one of his notes to Co. Litt., observes upon this case, that it is founded upon principles both just and equitable, but that it may be doubted whether a more rigid adherence to the letter of the statutes would not have been more beneficial to the public. He adds, that the French showed a much more rigid and pertinacious adherence to the letter of their laws respecting the registration of deeds and wills. And the learned writer relates that several laws respecting substitutions being unsettled, and the laws respecting them being different in different parts of the kingdom, they were all reduced into one

law by the celebrated Ordonnance of August, 1747. That ordonnance was framed by the Chancellor d'Aguesseau, after taking the sentiments of every parliament in the kingdom upon forty-five different questions proposed to them upon the subject. The 39th question is—whether a creditor or purchaser having notice of the substitution before his contract or purchase is to be admitted to plead the want of registration of the deed creating the substitution. All the parliaments except the parliament of Flanders agreed that he was; that to admit a contrary doctrine would make it always open to argument whether the party had or had not notice of the substitution; that this would lead to endless uncertainty, confusion, and perjury; and that it was better that the right of the subject should depend on certain and fixed principles of law, than upon rules and constructions of equity, which must be arbitrary, and, consequently, uncertain. The Ordonnance of August, 1747, was framed accordingly. And the same principle of law is embodied in the Code Napoléon, Art. 1071.

The Real Property Commissioners, and the Committee of the House of Commons, on the bill to erect a general registry of deeds, concurred in the views of the Chancellor d'Aguesseau; and it may be doubted whether the establishment of the doctrine in *Le Neve* v. *Le Neve* has not, by letting in the doctrine of notice, very materially defeated the objects of the Registration Acts.

With all respect for the truly illlustrious name of Lord Hardwicke, it will probably be admitted that he took a more confined view of the matter in question than the Chancellor d'Aguesseau and the parliaments of France, and decided rather with reference to the particular case than on the broad principles of jurisprudence, for a masterly knowledge of which the French Chancellor is celebrated, and perhaps unrivalled.

These reflections will probably suffice to suggest the importance of looking beyond our own reports and text books for legal knowledge, and extending the sphere of that knowledge—as much as our opportunities and our leisure will permit. I say it with this qualification because it is our *first duty* to learn *our own* national law. But we must not neglect whatever may be useful to extend and improve our law, and enable us to perform in the most perfect manner the duties which the constitution of our country has allotted to us, or may hereafter assign to us. More and more will be required of us as time rolls on, and the improvement of the country in learning and intelligence progressively increases; and we must therefore endeavour, by extending the sphere of our studies, to qualify ourselves for the greater services which will be required of us.

This is a topic especially important to the students and other junior

members of the legal profession, who will probably find their lot cast in times when men will be less willing to be satisfied with the beaten track of mere legal routine and precedent than they are at present,—and when the judges and the legislature will expect of them what will scarcely be expected of their seniors.

We sometimes hear persons of learning and experience ask why students should be called upon to submit to studies which they in their studentship were exempt from. The question would be unanswerable if time produced no changes in the wants of human society. But every year that passes teaches us the contrary, and teaches us that we must not remain stationary.

Again we sometimes hear persons of mature age say—Are we to go to school, and is our learning to be neglected which we have accumulated with great labour, and in many years? This sort of jealousy is natural, but unfounded. Their learning and experience can never become neglected among a practical and thoughtful people. Even the obsolete portions of their learning have value as part of the legal history of the country—as part of the chain which connects the past with the present. And their experience is necessary for the good government of the realm,—and the more inestimable because, like a great forest tree, it can be produced only by the lapse of many years. Without experience indeed nothing can be safely done in the government of mankind. The instability of laws and institutions of some other countries affords us a useful lesson, showing that whatever is not grounded on the past history of a nation, and does not arise out of it by a process of development, cannot take any deep roots. It is by the conjunction of experience and mature learning, acquired in a long course of years, with the improvements which the spirit of our times suggests, that the welfare and greatness of the country can best be promoted.

In order to explain how the scope of legal studies may be most usefully enlarged, it is now necessary to lay before you a plan of the whole science of law. This process will show you our Municipal Law as a part of a great moral science, and thence the connection of every branch of that science with our law, and the uses of that connection, will appear.

It is unnecessary to define law, for this has been done by Blackstone,[a] with whose masterly explanation of its nature you are all familiar. We will proceed therefore at once to natural law—or the law of nature, which is the basis of every branch of law.

It is defined by Grotius,[b] to consist in certain principles of right

[a] Blackst. Comm. book i. Introd. § 2.

[b] Grot. Droit de la G., liv. i., ch. 1., § 10.

reason, which enable us to know that a certain action is right or wrong, according to its congruity or incongruity with the reasonable and social nature of man, and, consequently, that God, who is the Author of nature, commands or forbids that action.

Some writers have treated this law as mere matter of opinion, and so vague and uncertain that it does not deserve the name of law. But they have been abundantly refuted by Grotius, in the preliminary discourse to his great work: and it is indeed absurd to say that, whereas the Creator gave us reason and a sense of right and wrong, requiring of us the performance of certain duties to himself and to man,—we are unable to perceive those duties by the use of our reason. We must therefore assume, as demonstrated, that there are such duties, and that by the use of our reason we can discover them; and this natural law is expressly recognised by Scripture, for St. Paul says—that "when the Gentiles, who have not the [moral revealed] law, do by nature the things contained in the law, they are a law to themselves:" and he continues—"Which show the work of the law written on their hearts, their conscience also bearing witness, and their thoughts in the mean time accusing or else excusing one another" (Rom. ii. 14, 15).

The law of nature is to be deduced from the natural state of man, which is not (as some writers have supposed) that of a savage in the woods, or a sort of wild animal in human form (a condition in which man never existed, except when accidentally degraded below his nature), but that state which the reasonableness of man and the dignity of his immortal soul point out as the state for which he was intended by his Creator. Hence it is that from Natural Law, as we see it laid down in the Pandects by Hermogenianus,[a] civil society and all its institutions and contracts calculated for the welfare and improvement of mankind, are derived either directly or indirectly. And on the same principles the great French civilian, Domat, has elaborately deduced all laws from the two fundamental rules of Natural Law, confirmed by express revelation,—namely, love of God and love of our neighbour. Natural Law is divided into two branches, which it is important to distinguish one from the other; namely, Primary Natural Law, and Secondary Natural Law. The first is that which springs from the relation of man to man, without more, such as the rule that no man ought to kill or hurt another. The second is of a less simple nature. It arises out of some institution of which it is a consequence. So the Roman jurisconsult Paulus says, that theft is forbidden by Natural Law, and Ulpian says, that it is a thing naturally wrong.[b] Now this doctrine arises out of the institution of the law of

[a] Pand., lib. i., tit. i., L. 5. [b] Pand., lib. i. tit. xvi., L. 47.

property. That institution is grounded on Natural Law, because it is necessary for the welfare of society; and from it spring a variety of contracts and obligations, which are comprised in Secondary Natural Law. So the obligation of obeying the civil magistrate is a part of Secondary Natural Law.

I have said that Natural Law consists of principles of reason. This requires some explanation.

The duties of man are shown to him in three ways, and by three different authorities,—namely, first, the light of reason; second, civil laws; and third, revelation.[a] The first of these comprises the most general duty of man, especially that which tends to make him sociable. The second is the foundation of his duty as a subject of a state. The third comprehends his duty as a Christian, considered as such.

Hence arise three sciences—Natural Law, common to all men; Civil or Municipal Law, which is or may be different in different states; and Moral Theology, so called in contradistinction to Dogmatic Theology, which teaches doctrines and not duties. But the obligatory force of all these springs from one source—the Divine will.

When the jurists say that Natural Law consists of principles of reason, they do not mean to exclude the other two moral sciences above mentioned, for no doubt many things in Natural Law are confirmed and explained by Moral Theology, and even by Civil Law; but it is nevertheless necessary to distinguish those three sciences from each other, as they prescribe obedience to the duties which they comprehend on different principles, because the immediate authority from which they are derived is different, though in many instances their rules are similar.

Moral Theology is more extensive than Natural and Civil or Municipal Law, because the first of these two sciences chiefly, and the second exclusively, regard the external acts of men, while Moral Theology comprehends the exercise and cultivation of piety and other internal virtues, and the regulation of things which are not manifest to the exterior forum.

Ethics also are a science more extensive than Natural Law. Ethics comprehend the whole range of morality, and treat of all virtues and vices, and the principles by which moral men are governed; whereas Natural Law has regard chiefly to duties and rights, considered as a rule of external conduct for man, regarded as a social, responsible being, bound to maintain and procure, as far as in him lies, the welfare of society.[b]

We must next divide Natural Law into branches, with reference to

[a] Pufendorf, Devoir de l'Homme, Preface, § 1, &c.

[b] Pufendorf, Devoir de l'Homme, liv. i., ch. iii., § 9.

the subjects to which it is applied. First, When it regards the relations of different sovereign communities with each other, it is called *external public law,* or *international law.* Secondly, When it regards the government of those communities within themselves, it is *internal public law.* Thirdly, When it regulates the rights of individuals, considered as such, and their transactions among themselves, it is *private law.* But, in the last two of these branches of law there is an admixture of arbitrary or positive law, deriving its force from the command of a human superior. And a considerable part of International Law is composed of treaties in the nature of contracts,—and usages which, however, are (as such) binding only in a somewhat qualified manner. The obligation of treaties is a part of secondary Natural Law, and international usages are in many instances founded on or arising out of Natural Law.

A plan has now been drawn showing how all laws spring out of Natural Law, from whence the connection of the different branches of law with each other appears. They all have for basis that law *quod naturalis ratio inter omnes homines constituit*;[a] that is to say, Natural Law, the will of the Creator revealed to us through our reason. It follows that the principles of justice which constitute Natural Law, and which it is the chief object of the science of jurisprudence to determine, must be a necessary part of all legal learning,—necessary for the full and profound and broad comprehension of every system of law, and useful to all who are concerned in the administration of the law and in legislation.

We will now proceed to Municipal Law, which is the chief subject to which in the performance of my duties I shall have to address myself.

"All nations," says Gajus, "who are regulated by law and by morals, are governed partly by their own laws, and partly by the law common to all men."[b] They are governed partly by positive or arbitrary and partly by Natural Law, which is confirmed and enforced by the civil power, and thus becomes a portion of the Civil or Municipal Law.

Gajus here gives us the great division of laws into two classes—Immutable Laws, and Arbitrary or Positive Laws. The nature of these classes and their relation with each other, must now be considered.[c]

These immutable or natural laws are defined by Domat, the great French civilian, to be such as are necessary consequences of the two fundamental laws—*love of God and of our neighbour*—and which are so essential to the engagements which form the order of society, that

[a] Pand. lib. i., tit. i., L. 9. [b] Ibid.
[c] Domat, Loix Civ.; Traité des Loix.

it is impossible to alter them without injury to the foundations of that order. The other class—*Arbitrary Laws*, are those which may be differently established, changed, and even quite abolished, without violating the spirit and intent of the fundamental laws, and without injuring the principles of the order of society.

It appears from this first idea of immutable or natural laws that they derive their origin from the two prime laws of which they are an extension, and that the rules of equity are what the spirit of the second law demands in every engagement, and what it points out to be essential and necessary.

The origin of Arbitrary Laws requires to be explained somewhat more in detail. Two different causes have rendered the use of them necessary, and are the source of that great multitude of arbitrary or positive laws which we see in the world. The first of these causes is the necessity for regulating certain difficulties which arise in the application of the immutable laws, when those difficulties must indeed be provided against by law; but the immutable laws do not regulate them. A few examples will render this clear.

For a first example of the necessity of Arbitrary Laws, it is a natural and immutable law that persons, who have not yet attained a sufficient use of their reason and knowledge of things for want of age, should not have the uncontrolled management of their estates and affairs. But there is no natural law appointing *at what age* men attain that capacity which a man ought to have before he is intrusted with the exercise of his full power over his property. Yet some general rule, applicable to all men subject to the legislature of the particular country, is requisite to prevent endless difficulty and uncertainty. It has been found necessary to do this by an arbitrary or positive law, which determines the age of majority. That law differs in different countries, and may be altered as the interests of the community may require.

Thus it is a natural and immutable law that a widow, not having any means of her own, should have some provision out of the estate of her deceased husband. But there is no Natural Law defining what that provision shall be, nor how it is to be determined. This has therefore been done by an Arbitrary Law, which defines by a general rule what the dower of widows shall be.

Thus, for another example, it is a natural and immutable law, that he who is the owner of a thing should continue to have the property of it, until he have divested himself of it voluntarily, or become divested of it in some just and legal way. It is likewise another natural and immutable law, that possessors ought not always to be in danger of being molested in their possession by claims for ever; and that he

who has been in possession of a thing for a long time should be looked upon as the owner of it: because men are naturally careful not to abandon to others what belongs to themselves, and because we ought not to presume without proof that a possessor is an usurper.

If we extend too far the first of these two laws, which declares that the owner of a thing cannot be deprived of it but by legal titles and conveyances, it will follow that whoever can show that either himself, or they from whom he derives his right, have been owners of an estate, though they have been out of possession of it for centuries, will be restored to the estate and turn out the possessor, unless, together with his long possession, he can show a title which has taken away the right of the first owner. And if, on the contrary, we extend too far the rule which makes it be presumed that possessors are owners of what they possess, we shall do injustice by taking away the property from all who are not in possession.[a]

The contradiction to which these two laws might lead us—one of them restoring the first owner against an ancient possessor, and the other maintaining a new possessor against the right owner—required regulation by an arbitrary law, that they who are not in possession and who, notwithstanding, claim the right of property, should be bound to assert and prove their right within a certain time; and that after that time the possessors who had not been molested in their possession should be maintained in it. This has been done by the arbitrary laws called Statutes of Limitations.

All such arbitrary laws, which are consequences of immutable laws, have two characters which it is important to distinguish, and which make them two laws in one. For in these laws there is one part of what they ordain, which is of the law of nature, and there is another part which is arbitrary. Thus, for instance,—in the Law of Dower two dispositions are included; one that widows shall have some provision for their maintenance out of their husbands' estates, and the other which defines what that provision shall be. The first is a natural and the other a positive or arbitrary law.

The second cause of the arbitrary laws was the invention of certain artificial institutions and usages, which were intended for the benefit of society. Such are feudal tenures, primogeniture, gavelkind, entails, settlements, the distinctions between legal and equitable estates, and other things, the establishment of which was arbitrary. And these matters, which are the invention of man, and which may therefore be termed *arbitrary matters*, are regulated by a vast number of laws and rules of law of the same nature.

Thus we find in society (as Domat judiciously observes) the use of

[a] See Mill, Princip. of Polit. Econ. b. ii., ch. ii., § 2.

two different sorts of matters which are the objects of law. Some are so natural and so essential to our common wants that they have been always in use in all places; such as exchange, letting and hiring, the contract of loan, guardianships, and other covenants and matters. Some, on the other hand, are artificial and invented, and confined to particular places or countries. But even these matters invented by men have, or ought and profess to have their foundation in some principle of the order of society in general, or of the particular society in which they prevail.

It is to be observed also with regard to these arbitrary matters, that though it would seem that they must be regulated entirely by arbitrary laws, yet there are many natural laws relating to them. Thus in the arbitrary matter of settlements it is provided that a voluntary settlement shall not be good against creditors. So in the arbitrary matter of the Law of Estates it is provided that tenant for life or his representatives shall not be prejudiced by any sudden determination of his estate. Therefore, if a tenant for his own life sow the land, and die before harvest, his executors shall have the emblements or profits of the crop. This is natural justice to the tenant and to the commonwealth; and Lord Coke says, "Lest the ground should be immanured, which would be hurtful to the commonwealth, he shall reap the crop which he sowed in peace."[a]

This explanation of the nature of immutable and arbitrary laws gives us the first principles of all Municipal Law, both public and private; and those first principles are very important to be remembered, for they show how Municipal Law springs out of Natural Law, which is the foundation of all human laws, and thus indicate the place which Municipal Law holds in the great moral science of general jurisprudence. It is easy to infer also from the sketch of that science which I have presented to you, how every one of its branches bears an intimate relation to the others,—all being equally grounded on the great system of human society, founded by the Divine Will, and resulting from the reasonable and responsible nature of man, and the condition in which he is placed on earth, whereby duties are cast upon him from which all legal obligations are derived.

The use of this comprehensive view of law and its branches, and the unity of their foundation, will easily suggest itself to a thoughtful mind. As it is important for the complete knowledge of any branch of natural physical science to be acquainted with the connection of the physical sciences with each other, and the general laws of nature which pervade the whole creation, so it is difficult to attain a profound and masterly knowledge of any particular branch of jurisprudence—

[a] Co. Litt. 55. a.

such as Municipal Law—without some notion of the great moral science to which it belongs, the connection of the parts of that science, and the fundamental rules which constitute its unity.

The chief object of a lawyer no doubt is the knowledge of the laws of his country, considered as rules of conduct, deriving their authority from the supreme civil power. This is the work of *memory*. But a lawyer must also explain and reason upon those laws, and assist in improving them and framing new laws. For this part of his duty he must acquire more than the mere knowledge of Municipal Law. And here it is that the science of general jurisprudence becomes necessary, to furnish comprehensive views of law and legislation—theories, arguments, and reasons of law; to show what principles should be extended, and what restricted—what rules may be altered and what ought not to be touched, and to give the lawyer and the legislator a sort of framework in which he may place his ideas, and a scheme for the arrangement of the knowledge which he from day to day acquires. These objects I shall never lose sight of in the readings which I shall have the honour of delivering here. The recollections of this venerable place, and the memorials of great and illustrious advocates, judges, and statesmen by which we are surrounded, inspire me with a zeal for the performance of the duties intrusted to me by their successors, which may in some degree compensate for the absence of other qualifications.

This numerous attendance, and the presence of so many learned and eminent persons, would almost overwhelm me (conscious as I am of my own deficiencies), if I did not on the other hand feel encouraged by the reflection that those very circumstances show how highly any effort for the augmentation of legal knowledge is appreciated by those whose countenance is most valuable.

And I am further encouraged, by the knowledge that the materials out of which it will be my duty to construct my readings are such that my labours cannot be without *some* use: for it is impossible that the doctrines of the sages of the law, and the oracles of European jurisprudence, can be presented to a cultivated and intelligent mind without producing some valuable result.

SECOND READING.

ON THE USES OF THE ROMAN LAW, AND ITS RELATION TO THE COMMON LAW.

The uses which we may derive from the science of general jurisprudence to improve the study of our own law, by furnishing us with a great and comprehensive view of law, and also with rules and doctrines founded on reason and justice, showing the grounds of Municipal Law, have been explained in my first reading.

I have shown that Municipal Law is but a branch of a great moral system, having a sort of unity and harmony in its parts which link them all together, so that the study of one must be assisted by a knowledge of the remainder, and of their relation to each other. A portion of this subject is still to be considered, which cannot be omitted without leaving what has been done very incomplete, and breaking the engagement into which I have entered, to bring before you such knowledge as must be useful for the more profound and scientific study of our own law.

I refer to the mass of learning contained in the *Corpus Juris* and its commentators, and known as the Roman Law; which claims our attention for more than one reason. It has a character of universality which no other body of law possesses; for there is no part of the civilized world where in some form or other, and to a greater or lesser degree, it does not exist in a living state. And Lord Holt, in *Lane* v. *Cotton*, 12 Mod. 482, tells us that the laws of all nations are raised out of the ruins of the Roman Law, and that the principles of the English Law are borrowed from that system, and founded on the same reason. Lord Hale also said, that the true grounds and reasons of the law are so well delivered in the Pandects, that a man can never well understand law as a science without resorting to the Roman Law. To this character of universality another distinctive feature is added. There is no body of law that contains the rules of Natural Immutable Law in a purer state, to a greater extent, in a more systematic form, or less mixed with purely arbitrary laws.

Thus Pufendorf speaks of the *Corpus Juris* as the great collection of the Natural Law; and the Chancellor D'Aguesseau says that to the

Roman jurisconsulti alone justice seemed to have revealed all her mysteries. It is therefore the foundation of the science of general jurisprudence.

These reasons are abundantly sufficient to show that in our future labours we must not neglect the Roman Law; and they also, in my opinion, lead to the conclusion that some reflections on the historical relation of the Roman Law with our own law, and on its uses, will be a useful subject for this preliminary reading.

Notwithstanding the merit and value of the Civil Law as a most ancient and complete body of legislation, and as a system of written legal reason, we must admit that its decided defeat under King Edward I. by the Common Law, was a great national benefit. That defeat is one of the chief causes which led to the development of our mixed constitution, wherein the three elements of government—*monarchy*, *aristocracy*, and *democracy*, are so happily united and blended together as to form the most successful (I had almost said the *only* successful) constitutional government in the world.

The victory of the Common Law in a great degree tended to preserve that most valuable and vital part of our constitution—local liberties and local government, produced by the feudal ingrafted on the Saxon institutions. If the Civil Law had prevailed, the feudal and aristocratic part of our constitution would have been depressed before the popular part had come to its proper strength, and the monarchical part would have thus been unduly exalted. The local government and local institutions of the Common Law would have given way to a Byzantine prerogative.

In saying this, I do not refer to the famous text in the Pandects, "*Quod principi placuit, legis habeat vigorem.*" That is a mere rule, defining one of the sources of the Roman Law. It is indeed curious that the text in question expressly rests the imperial prerogative on a supposed delegation of power to the emperor by the people. *Cum populus ei et in eum omne imperium suum et potestatem conferat.* The doctrine commonly known as that of divine right of kings is not a doctrine of the Civil Law, ancient or modern. That doctrine was derived by analogy from the Jewish kings, and belongs not to the Roman emperor but to the kings of the barbarians.[a] The great civilian and theologian Suarez, (whose doctrines are most ably summed up by Mr. Hallam) (lib. iii. cap. iv. § 5), very judiciously lays it down that the political power of government, considered *in se*, is *juris divini*, but that the power vested in a particular man is *juris humani*: and that whether the government of a particular country be

[a] Anaclet. Reiffenstuel, Jus. Can. lib. i., tit. ii., p. 62. Allen on Royal Prerog. p. 23. And see Hallam, Literat. of Europe, vol. iii., p. 356.

a monarchy or a republic, is matter of human institution. I refer to a different reason. If the Civil Law had obtained the ascendancy in this country, the administration of the law would have fallen entirely into the hands of *legists*, probably often foreigners—men from their birth and education averse to the Saxon and feudal institutions; and their decisions would have formed the Constitutional Law. They would have advised in Parliament and managed public affairs.

The profoundly scientific character of their system would have deprived both the Barons and the Commons of their full share in the business of the country. This took place in France, and the result is well worthy of examination.

Montesquieu[a] shows that the ascendancy of the Roman Law in France, after its revival in the school of Bologna, and the example of the Ecclesiastical Courts, gradually cast into disuse the administration of justice by the Peers and by the feudal Lords in their courts. Thus was lost the ancient usage to be seen in the Capitularies and the Salic Law, that justice was not administered by a Judge without the assistance of the Peers—the *judicium parium*.

The Civil Law was too scientific to admit of any persons not regularly trained in the schools sharing in its administration. France was divided into two portions—the *pays de droit écrit*, where the Roman Law was the Common Law of the land; and the *pays coutumier*, where the Customary Law of the particular province prevailed. But even in the latter the Customary Law was expounded and interpreted by the Roman Law: and so in the rest of Europe both the *Liber Feudorum*, and the Municipal Feudal Law of each country were controlled by the doctrines of the Civil Law.

[b] The same causes induced St. Louis to summon civilians to the *Placita Conventa* of the kingdom to assist the Barons with their advice. But the Barons soon neglected to attend, because the law became too abstruse and artificial for all but the doctors who had gone through a legal education. The consequence of this was that the legists obtained from the crown the privilege of voting. Afterwards these assemblies, to which both civilians and nobles were summoned, were held more frequently in the king's palace, and acquired the name of Parliaments: and the summons of the civilians became permanent commissions or offices—whereby the management of affairs fell into their hands. These offices became, in practice, hereditary.

When the Parliament was thus composed, in great measure, of officers of the crown, it was made stationary at Paris, instead of following the king, and it sat during the greater part of the year, the Peers

[a] Liv. xxviii., ch. xlii.

[b] St. Simon, Mémoires, vol. xxi., p. 172.

almost entirely discontinuing their attendance. This was the assembly where the greatest matters were decided, and the highest acts of state performed, and it superseded the National Assembly of the Estates of the kingdom.

Thus a distinct class or order of legists—professed civilians and servants of the crown—was formed. The Crown made use of them against the nobility; and sometimes relied on the nobility to check them: but the Parliament of Paris was always jealous of the nobility, and therefore ready to support the Crown in every measure calculated to centralize authority and restrain local and feudal liberties and privileges.

You will remember, that Blackstone said, that if ever liberty were restored in France, it would be by means of the parliaments. They were, indeed, illustrious and venerable assemblies; but the causes, the rise and progress of which I have endeavoured to describe, rendered impossible what Blackstone foretold. The parliamentary men of France were a class too much insulated. They were not sufficiently independent of the Crown. They were compelled to lean on the Crown for support against the nobility. But even if that had not been so, they must have been too much separated, as a legal and official aristocracy, from the rest of the *tiers état*, or commonalty, to act with that order, or assist them in developing political liberty. And by drawing into their own hands the whole administration of justice, the legists injured the political status of the rest of the community, and rendered them comparatively unfit for political power.

The history of the English law and constitution presents in these particulars a striking contrast to that of France. The Feudal and Saxon laws were the basis of the constitutional laws of England; and though the Civil Law exercised considerable influence over them, it never obtained the ascendancy. The consequence of this was, that the distinctive features of the National Law were preserved. It is true that the Common Law soon became complicated, and required considerable study to be known, so that it was chiefly administered by a body of lawyers making the law their profession. But still it was a system essentially national—requiring more experience and patience than scholarship and metaphysical acumen. Thus its administration never fell entirely into the hands of the legists. A great part of it was intrusted to persons not making law their profession—such as sheriffs, coroners, justices of the peace, and jurors. In the hands of such persons was and remained the government of the counties, cities, boroughs, and towns—the local character of which was thus preserved from the centralizing encroachments of the royal prerogative. And the parliament was always principally composed of men who were not

lawyers by profession—even the upper house, the supreme court of ultimate resort.

Thus, we find in Fortescue (c. 49), that the children of the important men of the kingdom—the knights and barons and grandees of the land—resorted to the inns of court to study the Common Law, for some knowledge of law was thought to be required of all persons of station, and many of that class devoted themselves to its study and practice as a profession. So there was no hostility between the professors of the Common Law and the nobility or the commons,—and indeed we find that from our profession a great part of the peers of the realm are sprung. For the same reason, the lawyers have never caused the barons to discontinue their service in parliament, and the peers show no jealousy of the judges, or of those who are usually called the *law* lords. Thus, we have in this country no *noblesse de robe*—no distinct legal aristocracy, like that which existed in France.

In the House of Commons the opinion of the lawyer is listened to on all legal questions; but he is no more looked upon as belonging to a separate class or order in the community than a soldier or a sailor. And the practice of the law at every generation raises eminent persons to sit among the magnates of the realm, by whom they are regarded as men rightfully entitled to be placed among the nobility, and bringing to that august assembly an accession of weight and power by their experience, and the dignity of the great employments with which they have been invested.

This eminently national character of the law of England and its administration is a very important element in the development of our liberties, and may also be a cause of the stability of our institutions. The participation of a great proportion of the nation in the administration of justice is no doubt a means of rendering the nation fit for the exercise of political power, and this is a truth which has unfortunately been overlooked by the modern framers of constitutions on the continent. They have too much neglected the means of rendering the people fit to exercise power, and with a view to uniformity of plan and principles, they have neglected all those local institutions which are the elements out of which public liberty is formed.

These reflections were necessary to show us the political effect which the fate of the Civil Law in England has produced (with many other causes), upon the progressive formation of our laws and institutions.

We must now proceed to consider the uses to be derived from it. Chancellor Kent, the Blackstone of America, has thus judiciously described the peculiar value of the Civil Law to us:

"The value of the Civil Law is not to be found in questions which relate to the connection between the government and the people, or in

provisions for personal security in criminal cases. In everything that concerns civil and political liberty, it cannot be compared with the free spirit of the English and American Common Law. But upon subjects relating to private rights and personal contracts, and the duties which flow from them, there is no system of law in which principles are investigated with more good sense, or declared and enforced with more accurate and impartial justice. I prefer the regulations of the Common Law upon the subject of the paternal and conjugal relations, but there are many subjects in which the Civil Law greatly excels. The rights and duties of tutors and guardians are regulated by just and wise principles. The rights of absolute and usufructuary property, and the various ways by which property may be acquired, enlarged, transferred, and lost, and the incidents and accommodations which belong to property, are admirably discussed in the Roman Law, and the most refined and equitable distinctions are established and vindicated. Trusts are settled and pursued through all their numerous modifications and complicated details, in the most rational and equitable manner. So the rights and duties flowing from personal contracts, express and implied, and under the infinite variety of shapes which they assume in the business and commerce of life, are defined and illustrated with a clearness and brevity without example. In all these respects, and in many others which the limits of the present discussion will not permit me to examine, the Civil Law shows proofs of the greatest cultivation and refinement; and no one who peruses it can well avoid the conviction, that it has been the fruitful source of those comprehensive views and solid principles which have been applied to elevate and adorn the jurisprudence of modern nations."[a]

The learned commentator here very correctly points out the true merits of the Roman Law. Let us see how they are to be made available to our purpose.

In the first place the Roman jurisprudence ought to be studied as a system,—as a science which cannot be usefully comprehended unless regard be had to the bearing of one part on the others. Unless this be kept in mind, the use of insulated texts of the law will only mislead, or be of little service.

This is so with regard to the University, Ecclesiastical, and Maritime Courts, where the Civil Law, so far as it is admitted into use, has a legal authority,—but in our own law, the Civil Law is in general to be used only as written reason,—and the opinion of the learned. Of this we have an instance in the case of *Ryall* v. *Bowles*, 1 Ves. sen 370, and 1 Atk. 181, where Lord Chief Justice Lee, sitting with Lord Hardwicke, said, " Though no judicial determination, yet I may cite a

[a] Kent, Comm., vol. i., pp. 546, 547.

Civil Law authority concerning partnership, though not an authority on which a judgment is to be founded in our courts; yet, as is said by Lord Raymond, may be used as the opinions of learned men." And so, in the same case, Mr. Justice Burnet cites the Roman Law with regard to pawns. And in *Acton* v. *Blundell*, 12 Mees. & Wels. 353, Tindal, C. J., said, "The Roman Law forms no rule binding in itself upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited in our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law,—the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the Municipal Law of most of the countries of Europe." Many other cases, such for instance as that of *Coggs* v. *Barnard*, might be cited where the judges have made great use of the written reason of the Roman Law.

Now it is clear that such authorities will have weight with our courts only so far as they are grounded—not on the positive Law of Rome—but on sound legal reason and equity. And without a comprehensive knowledge of the law, it is difficult to distinguish what principles are purely equitable, and what partake of the character of arbitrary law, and appertain to the positive institutions and legal rules of the Romans. This distinction is noticed by Lord Loughborough, in the case of *Stackpole* v. *Beaumont*, 3 Ves. jun. 96.

An instance of the danger of using insulated texts of the Civil Law *pro re nata*, without regard to other portions of the law explaining them, is to be found in the case of *Kennett* v. *Abbot*, 4 Ves. jun. 808.

In that case Lord Alvanly, M. R., cited this passage of the Digest: —"Falsam causam legato non obesse verius est, quia causa legandi legato non cohæret. Sed plerumque doli exceptio locum habebit si probetur alias non legaturus fuisse." This law his lordship interprets thus:—

"The meaning is that a false reason given to a legacy is not of itself sufficient to destroy it: *but there must be an exception of any fraud practised*, from which it may be presumed the person giving the legacy would not, if that fraud had been known to him, have given it." Now, *exceptio doli* does not mean an exception of any fraud practised. It is a technical name of a plea denying the equity of the plaintiff's demand. Thus the text of law in question does not refer to any fraud practised, nor to the testator's ignorance of that fraud. It simply means that if it be proved that the testator would not have given the legacy had he been aware of the falseness of the supposed fact which he stated as his reason for giving it, then the plea called *exceptio doli* would be allowed, and the legatee would fail. You see, therefore,

that in this case the sense of the authority cited was lost, because the judge did not look beyond the particular text which was cited by counsel. The spirit and sense of the law is, that where the error of the testator is not shown to be essential, it may be presumed that the testator would not have withheld his bounty if he had been acquainted with the truth; and a like principle has been followed in the English Law.

To use even the purely equitable rules of the Roman Law with full advantage, that system of jurisprudence must be studied as a whole, and in a comprehensive manner, that they may be applied according to their true spirit. This is beautifully shown by a passage in Domat. It is necessary, says that great writer, to be careful, lest under the pretext of preferring natural to arbitrary laws, you extend a natural law beyond the just limits drawn by an arbitrary law, whereby it is rendered consistent with another natural law, and which gives to each its true effect, and lest you thereby wound that other natural law, while you think that you are dealing only with an arbitrary law. Thus, for instance, it is a natural law, that he who has caused any damage to another must repair and make amends for it. But if so great an extension were given to this law as to oblige the debtor who has not paid a simple debt at the time when it was due to repair all the loss which his creditor has suffered by the default of payment,—as, for instance, if his goods were taken in execution and sold, or his house had fallen into ruin because he had not the means to repair it,—such an application of that law, itself just and natural, would be unjust. It would wound an arbitrary law which defines and limits the damages which a debtor must pay, to that remuneration called *interest*. By wounding that arbitrary law, two natural laws on which it is founded would be violated,—one which does not allow men to be liable for unforeseen circumstances, which are more of the nature of fortuitous events than consequences reasonably imputable to them, and the other which requires that the infinite variety of losses and damages which different creditors may suffer by default of their debtors should be regulated on one uniform system of compensation common to all causes arising from the same cause,—that is to say, the non-payment of a debt,—without distinguishing between the events which immediately cause those different damages. Their diversity arises from the difference of events which, so far as the debtor is concerned, are fortuitous, for which he ought not to be made answerable, and which would be the causes of an infinite amount of litigation.

This passage shows very clearly the care with which rules of equity must be applied, and that this cannot be usefully done without a knowledge of the system of which they form part, and that if a rule of

equity be used by itself, there will be danger of violating other equitable rules whereby it is limited. Thus we find Javolenus in the Pandects says,—*Omnis definitio in Jure Civili periculosa est.* And Paulus goes so far as to lay it down that—*Regula est quæ rem quæ est breviter enarrat. Non ut ex regula jus sumatur, sed ex jure quod est regula fiat;*—that is to say, a rule is not intended to make the law, but it is made *from* the law and expresses it in a brief form, whence it follows that to make use of the rule, the law must be known to which the rule belongs.

These observations must be kept in mind by whoever wishes to make a good use of the Pandects, which contain a multitude of rules and maxims, the value of which is so great that the Chancellor D'Aguesseau says, "It is impossible to fill your mind too much with those rules, which are so many oracles of jurisprudence and the *précis* of all the thought of the jurists." And our own law supports the opinion of the French Chancellor. A great number of these rules, taken from the Civil Law, are used by Lord Coke in his famous Commentary; such, for instance, as—*Id certum est quod certum* reddi potest:[a] *Ut res magis valeat quam pereat*:[b] *Quod semel meum est amplius meum esse non potest*:[c] *Quando lex aliquid concedit, concedere videtur et id sine quo res ipsa* esse non potest:[d] *Non quod dictum est sed quod factum est inspicitur*,[e] and many others. All of which are common rules and maxims of the civilians. And a great many cases, such as *Moon* v. *Durden*, 2 Wels. Hurls. & Gordon, may be cited, where these and other such Civil Law rules have been used by the judges.[f]

We will now take a brief view of the books which contain the Roman Law, and which constitute the Corpus Juris. They are—The Institutes; The Digest, or Pandects; The Code; and The Novels, or Novel Constitutions.

The Institutes were drawn up by three Commissioners, Trebonian, Theophilus and Dorotheus, and were published as law by the Emperor Justinian, in December A. D. 533. This is a very little work compiled on the model of the Institutes of Cajus or Gajus, and divided into four books, which gave occasion to a whimsical conceit of Accursius the Glossator, who attributed this division to analogy with the four elements, saying—that as the body was nourished by the four elements, so the mind was by the four books of Justinian. But the more important division of the matters contained in the Institutes is the celebrated classification of law under three heads,—namely, *persons*—*things*—and *actions*. The first book treats of persons, after two pre-

[a] Co. Litt. 45. b. 52. b. [b] Ib. 49. b. [c] Ib. 49. b.
[d] Ib. 56. a. [e] Ib. 36. a.
[f] Ram, Science of Legal Judgment, p. 15, chap. ii.

liminary titles on law; the second, the third, and the first five titles of the fourth regard things,—and from the sixth to the last title of that book the law of actions is explained.

Blackstone has followed this arrangement in his Commentaries; and though it has been very ingeniously attacked by Savigny [a] and by Mr. Serjeant Stephen, I believe it will be found to be on the whole the most reasonable and scientific. Without entering into a discussion, which would exceed our limits, I must say that this reason seems to me conclusive. All law regards the legal capacity and incapacity of persons, which constitute what is called their status,—or the rights of persons with regard to things,—or the remedies provided for enforcing the law, "Omne jus quo utimur vel ad personas pertinet, *vel ad res, vel ad actiones.*" This is a distribution of laws with reference to their objects. Law is administered *to persons,—regarding things,*—and by *means of actions or judicial proceeding.* It follows that the law ought first to classify persons with regard to their capacity and incapacity of rights and obligation, which is called the *status* of persons; and then to enter into the subject of those rights and obligations;—and subsequently to show the remedies for their enforcement and protection, which are amongst the principal objects of human society and government.

You will find the same principles of arrangement applied to criminal law in Lord Hale's Pleas of the Crown. They are observed in the Canon Law and in the Code Napoléon.

In the first part of the Institutes, where the status of persons is shown with reference to their natural and social circumstances, there is much that belongs exclusively to the customs of the Romans, but it contains the foundations of the Law of Status. The second part is more interesting to an English lawyer, for it teaches the elements of the law of property, as well as of the legal rights which have not property for their direct object. The third shows many principles and forms on which the administration of justice in all countries is constructed in a greater or less degree, and it includes the remedies called public actions, which seek to protect legal rights by the punishment of offenders.

We will proceed now to the Pandects, or Digest. This great work, prepared by Trebonian, with sixteen of the greatest judges and advocates of the time, was published as law by Justinian in January, 533, and it is the most important part of the Corpus Juris. It contains—condensed into fifty books—the most valuable portions of the writings of the ancient sages of the law, extracted from two thousand volumes, and consisting of a hundred and fifty thousand verses or

[a] Savigny, Traité du Droit Romain, liv. ii,, chap. i., § 59.

paragraphs. Each of the fifty books contains several titles, which are again divided into laws; and those laws are, in general, divided into parts, the first of which is called *Principium*, and the others paragraphs.

The general arrangement of this great compilation is modelled upon the perpetual edict of the Emperor Hadrian; but it has been the subject of severe and well-founded criticism. Pothier and Donellus have[a] justly blamed Trebonian and his colleagues for not adopting a more simple and lucid order in their work. Cujacius somewhat warmly resents the strictures of Hotman, but the learned are, I believe, agreed that the method of the Pandects is very defective. And it is remarkable that Cujacius himself (the greatest of all commentators), instead of following the order of books and titles of the Digest, endeavoured to assemble together the scattered fragments of the legal writings of which it is composed. Thus—as the skilful and zealous artist collects and curiously joins together the broken pieces of some ancient statue, presenting to the admiration of the world, if not all its fair proportions, at least a semblance of its ancient beauty and majesty—he brings before us, not the chequered work of Trebonian, but the Roman jurisconsulti themselves; the severe and oracular dignity of Papinian and Africanus; the lucid dialectics of Ulpian; the acuteness of Paulus; and the classic beauty of Gajus. Every fragment is separately commented upon and explained by Cujacius, with an erudition and legal acumen unsurpassed, perhaps unequalled, by any commentator, ancient or modern.

The most valuable attempt to re-arrange the Pandects was made by the great Pothier. But unfortunately he was not bold enough to overcome the prejudices of the learned. He did not, in his celebrated work, called *Pandectæ Justinianæ*, change the order of the books and titles of Trebonian; but he most skilfully arranged the different laws in each title, adding those in the other portions of the Corpus Juris, and thus forming a sort of concordance of the texts of the Roman Law. The system of Cujacius shows the true meaning of the Roman Jurists; that of Pothier brings within a small compass all the laws relating to the same subject.

The Cujacian method proves that science has greatly to lament the loss of the complete works of the jurist which existed in the reign of Justinian; but there is no sufficient reason to impute that misfortune to the author of the Corpus Juris. Their destruction probably arose from the disuse into which they fell after their most valuable portions were collected together and invested with legal authority; and Jus-

[a] Pothier, Præf. ad Pandect. capt. De Vitiis Pandect.; Donelli Comment. lib. i., tit. i.

tinian is guiltless of the loss of Papinian, Ulpian, and Gajus, as the monks of the middle ages are now proved by Cardinal Mai to have been of that of the classic writers of antiquity.

There are few titles in the Pandects that do not contain rules of great value to every lawyer, whatever may be his country and the law which he professes; but it may be useful to point out those which most concern ourselves.

The first four titles of the First Book give a description of Justice —of Law—of the History of the Roman Law, and its different sources. They are the elements of Jurisprudence and the Civil Law. The eighth title gives the classification of things. Some are *Divini Juris* —or dedicated to Religion—and others are *Humani Juris.* Some are by Natural Law common to all men, and others public. Some belong to corporate bodies; some to no one; some to individuals. Some things are corporeal; others incorporeal. This title contains the fundamental principles of the laws of things. The 17th, 18th, 19th, 20th, and 21st Books contain the laws of the most important contracts, on which our own Law of Contracts is founded. The 26th and 27th Books regard guardianship, and contain many rules which are useful to a Chancery Lawyer.

But perhaps the most practically important part of the Pandects to the English Lawyer is that which relates to testamentary dispositions; for where the Civil Law is admitted in the Ecclesiastical Courts, there the Temporal Courts are in general guided by the same law, that the judgments in the different Courts may be consistent. This part of the Pandects, commencing with the 28th Book—but especially the Three Books, 30, 31, and 32, which contain an extraordinary number of rules for the interpretation of wills, and the 33rd and 34th Books relating to bequests of particular things—are well worthy of attentive perusal, as they are full of rules which no judge would treat with neglect. And the first title of the 35th Book, entitled, *De Conditionibus et Demonstrationibus,* which is chiefly intended to show the distinction between conditions, and descriptions of legatees, is also of great practical use. It should be read with the 7th title of the 28th Book, intituled *De Conditionibus Institutionum,* which treats of Conditional Appointments of Heirs.

The titles 1st and 2nd of the 41st Book—which show the modes of acquiring property, and of acquiring and losing possession, are of the highest interest and use, as well as the remainder of that book which treats of acquisition by user—and of different titles of possession.

The 24th and 25th Books complete the Law of Contracts, and the 26th contains that of Sureties and the extinction of obligations. Such are the most essential portions of the Pandects.

We come now to the third part of the *Corpus Juris*,—namely, the Code.

In the third year of Justinian's reign he promulgated his first Code, containing his Constitutions and those of his predecessors. Fifty important points on which the ancient Roman jurists differed, were afterwards determined by as many Imperial Constitutions. These, which are called the *Fifty Decisions*, were distributed among the titles of a revised Code, which was published and the former Code abrogated by a Constitution of Justinian, dated the 16th of December, 584.

The Code of Justinian is divided into Twelve Books, and its subject-matter is arranged in a method resembling that of the Pandects: but the different Constitutions are arranged in the titles to which they belong, in chronological order, and all contradictions and superfluities are suppressed.

The fourth part of the *Corpus Juris* consists of the Novels, or *Novelle Constitutions*, which, to the number of 168, were enacted by Justinian after the publication of the Code. Some of these novels are of great utility, and particularly the 118th Novel, which is the groundwork (as Lord Holt and Sir Joseph Jekyll declare) of our Statute of Distribution of Intestates' Effects.[a]

Such are the parts whereof that great work the *Corpus Juris* is composed, which has occupied a larger space in the eyes of mankind than any other human body of legislation; and out of which the laws of all countries are raised.

It is, indeed, a monument of human wisdom well worthy of contemplation by the Philosopher, the Statesman, and the Lawyer. And I cannot refrain from exhorting all those who hear me not to neglect so useful an auxiliary to those studies which are their primary object.

What I have said respecting the Civil Law is necessarily very imperfect, and my only hope is that it may have suggested thoughts more valuable than any reflections which I am able to furnish.

[a] 1 Peere Wms. 27; Prec. in Chan. 598.

THIRD READING.

ON MUNICIPAL LAW AND THE CONSTRUCTION OF STATUTES.

"MUNICIPAL Law," says the Chancellor Kent, "is a rule of civil conduct prescribed by the supreme power of the state. It is composed of written and unwritten, or Statute and Common Law. Statute Law is the express will of the legislature rendered authentic by certain prescribed forms and solemnities."[a]

Barbeyrac defines Law to be "the will of a superior sufficiently made known in some way or other, whereby he directs either all the actions of those who are under his authority, or actions of a particular description."[b]

The distinction between natural or immutable and arbitrary or positive laws here becomes material, for the former being truths which are unchangeable, the knowledge of which is essential to reason, no one can plead ignorance of them, unless he be destitute of common reason which makes those laws known. But arbitrary laws have not their effect until the lawgiver has made them known. So with regard to Divine Laws, some are revealed to us through our reason, and are binding even without any express revelation; while others are binding only because they are expressly revealed to us.

As Divine Law is a rule of conduct prescribed to mankind by the Creator, so Municipal Law is a rule of conduct prescribed by the supreme power of the state to those who are subject to that power.

Municipal Law, as I have already explained, is composed partly of rules of Immutable or Natural Law, and partly of positive Law. But notwithstanding this distinction, and although laws confirming immutable Laws are themselves in the nature of Natural Law, yet all Municipal Laws whatever may, *when considered as such*, be described as rules prescribed by the civil power. The universal justice of all Laws consists in the relation which they have to the order of society of which they are the rules. The universal authority of all laws consists in the Divine appointment which requires men to obey them

[a] Kent, Comm., vol. i., lect. 20, of Statute Law.

[b] Pufendorf, Devoir de l'Homme, lib. i., chap. ii., § 1, n. 1.

the natural laws because they are justice itself, to which in many instances the Municipal Law gives its authority compelling men to obey them; and the arbitrary laws because they are derived from those who have the right to make laws, and to whom, by Divine authority, obedience is due; for without such obedience human society could not exist.

Here it is necessary to explain an apparent disagreement between natural and arbitrary laws, which consists in this. There are rules of Natural Law which Municipal Law does not enforce, and there are immutable laws which admit of exceptions and dispensations which the Municipal Law defines and gives effect to.

The reason of the first of these apparent discrepancies is that it is impossible for human Laws to give effect to the whole moral code of Natural Law, and therefore many things therein must necessarily be left to the province of Morality and Religion. But here the laws of different countries disagree—some enforcing natural obligations which others take no cognizance of. Thus, our law will not set aside a sale for mere inadequacy of the consideration; but the Roman Law gives relief to a purchaser who has paid a price amounting to above double the value of the goods. How far Municipal Law ought or ought not to extend in the enforcement of natural obligations are questions which must depend on a variety of considerations, applicable to each particular case, and which call for the exercise of all the wisdom of the legislator. But we must remember the maxim of Paulus, in the Pandects,—*Non omne quod licet honestum est.* The civil legislator does not dispense with the observance of obligations because he declines to enforce them. This subject, too extensive to be pursued further, has been admirably treated in a discourse of Barbeyrac on the permission of the law, which well deserves attentive perusal.

The second apparent discrepancy between Natural and Positive Laws, to which I have referred, has its foundation, as Domat shows, in this. Laws have their justice and authority only because of the relation which they bear to the order of society and to the spirit of the two fundamental laws—being our duty to God, and to our neighbour. Thus, if it happen that the order of society and the spirit of those fundamental laws require that some of the immutable laws be restrained, either by exceptions or by dispensations, they admit of those mitigations; but if nothing can be changed without violating the said spirit and the said order, then they admit neither of dispensation nor of exception. But even the laws which do admit of these restrictions do not, for this reason, cease to be immutable; for it is still true that they cannot be abrogated, and that they are irrevocable, though they be less general by reason of these exceptions.

Thus, the law which enjoins honesty and forbids deceit admits of no exception. But the law which commands the performance of contracts suffers an exception in the case of a minor who has entered into an engagement which the law does not permit minors to be bound by; because the order of society requires that such engagements be made null, and therefore the guardian, or next friend, of the infant is bound to plead infancy for him. Having established these fundamental principles, we will return to the distinction between written and unwritten laws.

As Municipal Law, considered as such, is a rule of civil conduct prescribed by the supreme power, it follows that that power must make known the rule to those who are required to obey it. The supreme power ought to make known the immutable laws which it confirms and sanctions, that men may be aware that they will be compelled by the civil magistrate to obey those laws, or punished for violating them; whereby those who are not disposed to obey the Natural Law by itself may be brought to obedience by human means. And the legislator ought to make known his positive arbitrary laws, because it would be unjust in many instances to enforce them, and in all to punish men for violating the enactments of the law, unless they have been previously told what the rule is to which they must conform.

Municipal Law is constituted in two distinct ways, the diversity of which renders it divisible into two branches; namely, unwritten law, and written law.

The first of these derives its authority from constant use. It is introduced by custom, and established by the tacit consent of the supreme power of the state. Thus Julian (in the Pandects) derives the authority of the unwritten law from the consent of the sovereign Roman people. Nam quid interest suffragio populus voluntatem suam declaret, an rebus ipsis et factis.[a]

This sort of laws are not enacted in writing, but they receive their binding force from long and immemorial usage; and therefore they are called unwritten law. Such are our general customs, or Common Law, and also the particular customs of certain parts of the kingdom, and those particular laws which are by custom observed only in certain courts and jurisdictions. To all these the general rule in the Pandects applies: *Inveterata consuetudo pro lege custoditur.*

Written law is that which has been written, enacted, and promulgated in writing by the legislative power of the state.

Of this kind are the statutes of the realm, the nature of which is shown in *The Prince's case*, 8 Rep. 20, where Lord Coke says:—"If an Act of Parliament be penned by assent of the King, and of the Lords

[a] L. 32, ff. De Legib.

spiritual and temporal, and of the Commons, or it is enacted by the authority of Parliament, it is a good Act: but the most usual way is, that it is enacted by the King, by assent of the Lords spiritual and temporal, and of the Commons. . . . . But if an Act be penned that the King, with the assent of the Lords, or with the assent of the Commons, it is no Act of Parliament, for three ought to assent to it: namely, the King, Lords, and the Commons, or otherwise it is no Act of Parliament." This imperfect sort of law is, as we are taught by Lord Coke, 4 Inst. 24, not an act, but an ordinance— which would be binding only on those by whose assent it was made; and was anciently held to be of a temporary nature, and alterable at the King's pleasure.

It is here necessary to observe that the style of the early Acts is various; and in some of them the King, or the King and the Lords, are named without the Commons, yet they are good Acts of Parliament, because they were made with the assent of the King, the Lords, and the Commons. But on this subject I must refer you to *The Prince's case*, 8 Rep., and to Dwarris on Statutes, p. 3, where the authorities are collected.

The assent of the Lords spiritual is not necessary to an Act, for Blackstone says (bk. i., c. ii., p. 156,) that if a bill should pass the House of Lords there is no doubt of its validity, though every Lord spiritual should vote against it, of which Selden and Coke give many instances. And Gibson (Codex, 286) gives the remarkable example of the Act of Uniformity, 1 Eliz. c. 2, which was passed with the dissent of all the Bishops, and therefore the style of the Lords spiritual is omitted throughout the whole.

It has been doubted whether the royal assent gives force of law to a bill where the amendments made in one house have not been submitted to the other house. In *Pylkington's case*, in the Year Books in the 33rd year of Henry VI., Chief Baron Illingworth and Justice Markham held, in the Exchequer Chamber, that a bill amended in the House of Lords and not sent back to the House of Commons would not become law by the royal assent, if the amendments of the bill vary the effect. But Chief Justice Fortescue held the Act to be valid, as it had been certified by the King's writ to have been confirmed in Parliament. But no decision on the point is in the book. In the years 1829 and 1842 the Acts 10 Geo. IV. c. 62, and 6 & 7 Vict. c. 78, were passed to remedy errors of this description in two Acts.

Such are the chief features of the statutes which constitute the written law of England. We will now proceed to consider the principles on which written laws are interpreted.

We have seen that Municipal Law is a rule of civil conduct prescribed by the supreme power of the state. And this rule we are

bound, by a general principle of Natural Law confirmed by Divine Law, to obey; for without such obedience human society could not subsist. It follows therefore that the legislator is, as Pufendorf says, bound to publish the law in as clear terms as possible, that the subject may know what the rule is to which he must conform: and if there arise any doubt or obscurity in the terms of the law an interpretation must be sought from the Legislature, or from the judicial power to whom the application of the law in disputed cases is committed.[a]

And first, justice requires that the law should be published and made known. On this point all the jurists agree, and the authority of the Roman Law is strong.

The Emperors Valentinian and Marcian commence their constitution on the amendment and interpretation of the law with these words:—All men ought to know the sacred laws that bind the lives of men; that they, knowing the enactments of the law, may avoid what is unlawful, and follow what is lawful. And Valentinian and Theodosius declare that they will permit no one to be ignorant of or neglect the imperial constitutions.[b] Agreeably with these principles the Novels of Justinian conclude by commanding the person to whom they are directed to make it known to all to whom it may regard. And it is an established rule in the Civil Law that promulgation is necessary for the validity of a law, and that in whatever place it has not been promulgated there it is of no effect. Thus the law, according to Roman jurisprudence, takes effect from the time of its publication to the people in each province and place.[c] So in the French code it is provided that laws shall take effect in each part of the country from the time when they may have become known there; and a rule is laid down showing when laws are presumed to be known in the provinces, according to the distance of the place from the capital.

It is singular that this principle is unknown to our common law. Our statutes are, according to Lord Hale, *an indenture tripartite* between the King, Lords, and Commons.[d] Thus they were, and are still, held to take effect immediately on their completion by the royal assent. All the Commons of England are parties to the Act by their representatives, as well as the King and Lords. This doctrine was carried so far that it was not an uncommon thing formerly for a judge, after sentencing an ignorant rustic to death, who complained of the severity of the punishment, to tell him that he was himself a consent-

[a] Pufend., Dr. des Gens, L. i., chap. vi., § 13.

[b] Cod., tit. xiv., l. 9.; tit. xviii., l. 12.

[c] Voet., Comm. D. Pand., lib. i., tit. iii.; De Legib. cap. ix., x.; and see Vinn. ad Instit., tit. de Legib.

[d] Hale, Hist. Com. Law, ii.

ing party to making the statute under which he was condemned: a statement which, however ingenious and convincing to the bar and perhaps the magistrates on the bench, probably only served to bewilder and astonish the unfortunate culprit.

At Common Law, every session of Parliament was looked upon as one day; and all Acts passed were, in contemplation of law, held to have been passed on the first day of the session. Thus, every Act of Parliament, which had no provision to the contrary, was considered, as soon as it had passed by receiving the royal assent, as having been in force retrospectively from the first day of the session, though in fact it might not have received the royal assent, or even been introduced into Parliament, until long after that day

Thus, where a statute provided that every deed of annuity granted *after the passing of the Act*, should be enrolled within twenty days after execution, and the Act received the royal assent in May, 1777, but the session had commenced in October, 1776, an annuity deed executed nearly four months before the royal assent was given, was adjudged void in the case of *Latless* v. *Holmes*, for noncompliance with the provision.[a] This extraordinary rule was probably derived from the Common-Law doctrine, that every term was taken to be one day, so that all judgments given related back to the first day of the term.

The case referred to affords a remarkable instance of a defect in our municipal jurisprudence which is well worthy of comment. Our jurisprudence, in some instances, is composed in too great a degree of arbitrary or positive laws, which are even allowed to subvert immutable or natural law: and we find, in the old reports, that the judges seem not to have been sufficiently imbued with the science of general jurisprudence to see always the right limits between those two classes of laws and the real province of each. Lord Coke (12 Rep. 65) lays it down, "that causes are not to be decided by natural reason, but by artificial reason and judgment of the law; which law is an act which requires long study and experience of it, before that a man can attain cognizance of it." There is an analogous principle in the Pandects. Julianus says: "Non omnium quæ a majoribus constituta sunt ratio reddi potest." From which Neratius infers that a reason must not always be required for the law, lest many things be shaken which are certain. So we say, that no man must be wiser than the law. But nevertheless, legislators, and also judges, who by their decisions in cases not already settled by authority, establish rules of law, are bound by the law of nature which was given to all men as a rule of conduct by the Creator.

[a] Stephen, Com., vol. i., p. 69.; *Latless* v. *Holmes*, 4 T. R. 660.

So Coke says, in his Com. on Litt. 11. b. :—"Such interpretation must ever be made of all statutes, that the innocent, or he in whom there is no default, may not be damnified." And so it is in the Scotch Law.[a] There he appeals, not to artificial but to natural reason, and to Natural Law, which, as I have already shown, is the foundation of all Law. And it cannot be denied, as a general principle, that that system of Municipal Law is the most just which is most in accordance with Natural Law.

These observations suggest an important reflection on the history of our Municipal Law. The Common Law of England, as it existed in the reign of Charles I., was perhaps the most artificial body of laws in modern Europe. On the continent of Europe, the Civil Law more or less controlled the formation of the Municipal Laws of all nations—especially after the full establishment of the school of Bologna; and this you will see well explained in the celebrated treatise, *De Authoritate Juris Civilis*, by Arthur Duck. The Civil Law, abounding in general rules and principles of Natural Law, had the effect of checking and modifying the artificial or positive character of the Feudal Law. This equitable spirit—systematizing and bringing under the authority of reason the positive usages and establishments of the middle ages, is to be seen in all the ancient Municipal Codes, from the Liber Feudorum itself, to the Statutes of the Italian Cities and the Coutumes of France. And, indeed, the drawing up codes or bodies of Law is no doubt attributable to the influence of Justinian's Corpus Juris Civilis.

Our law however was gradually formed by the decisions of Courts and the statutes of Parliaments, on the foundation of the Feudal Law; and was less affected by the academical teaching, and the abstract principles of the civilians, than that of any other European nation. Hence its peculiarly artificial and exclusively national characteristics.

But the whole modern history of our law, especially since the abolition of Military Tenures in the reign of Charles II., shows a tendency to prune or throw off the purely arbitrary artificial laws, and to legislate and adjudicate on more liberal and broader principles. It is felt that on political, as well as on legal and moral grounds, justice must be observed and held sacred.

Verissimum est, sine summâ justitiâ rempublicam regi non posse.[b]

The improvement of our law on enlarged and philosophical principles is indeed a great and important duty, on which depend in some measure the peace of society, and the stability of our happy constitution. Let us return from this brief digression.

[a] Ersk. Instit. b. i., tit. i., § 50.

[b] And see St. August. De Civit. Dei, lib. xix., cap. xxi.

was declared as early as the reign of Henry VI., and firmly adhered to, though the consequence of it was, sometimes to render an act murder which would not have been so without such relation.[a] It was altered by Stat. 33 Geo. III. c. 13, which enacts that the Clerk of the Parliament shall indorse on every Act the time when it receives the royal assent, which shall be the date of its commencement, where no other is provided. The preamble of the Act recites that the ancient rule is liable to produce great and manifest injustice: and yet it remained in full operation from the reign of Henry VI. to the 33rd year of George III. A remarkable instance of the tardiness of reform in legislation.

Sir Fortunatus Dwarris, in his learned and useful book on Statutes, informs us, that although in an Act of Parliament it is expressly enacted that it shall commence and take effect from a day named; yet if the royal assent be not obtained until a day subsequent, the provisions of a particular section, in its terms prospective, do not take effect till such subsequent day; *Burn* v. *Carvalho* (in error), 4 Nev. & Mann. 893. In *R.* v. *Justices of Middlesex*, 2 Barn. & Adol. 818, it was held that where two Acts of Parliament come into operation on the same day, and are repugnant, the one which last receives the royal assent repeals the other. Lord Tenterden said: "We are of opinion that the Act which last received the royal assent must prevail. Our decision is conformable with the doctrine laid down in the case cited; *Att.-Gen.* v. *Chelsea Waterworks*, 2 Dwarris on Stat. 675. There it was resolved that where the proviso of an Act of Parliament is directly repugnant to the provision of it, the proviso shall stand and be held a repeal of the purview, as it speaks the last intention of the makers. At the time when that resolution was come to, it was not possible to know which of the two Acts, passed in the same session, received the royal assent first; for there was then no indorsement on the roll of the day on which the bills received the royal assent; and all the Acts passed in the same session were considered as having received the royal assent on the same day, and were referred to the first day of the session. Now however it is well known on what day each bill receives the royal assent by the provisions of stat. 33 Geo. III. c. 13."

The case referred to by Lord Tenterden, of a repugnancy between a provision of an Act and a proviso in the same Act, was technically analogous to that of a repugnancy between two Acts passed in the same session; for all the Acts passed in a session are one statute, which is divided into chapters. So, where you find an Act of Parliament described as Stat. 1, or Stat. 2, it shows that two sessions of parliament were held in the same year of the sovereign's reign.

[a] *Reg.* v. *Thurston*, 1 Lev. 91.

Chancellor Kent observes, that even after the Stat. 33 Geo. III. c. 13, there is a good deal of hardship in the rule of the English law with regard to the time of the operation of statutes; for a statute takes effect from the very day it passes, if the law itself does not establish the time. It is impossible (he observes) in any state, and particularly in such a wide-spread dominion as the United States, to have notice of the existence of the law until some time after it has passed. It would be more just (he adds) that the statute should not be deemed to operate on the persons and property of individuals, or to impose pains and penalties for acts done in contravention of it until the law was duly promulgated. The rule however is fixed beyond the reach of judicial control, both in England and in America, except in the state of New York, where every law, unless a different time be prescribed therein, takes effect throughout the state, on and not before the twentieth day after the day of its being passed.

Dwarris illustrates the inconsistency of our doctrine and practice on this point by the case of *R.* v. *Bailey*, Russ. & Ryan, C. C. 1. A prisoner was indicted for maliciously shooting. The offence was within a week after the 39 Geo. IV. c. 37, passed, and before notice of it could have reached the place where the offence was committed. The judges thought the prisoner could not have been tried if the Act had not passed, and as he could not know of that Act, and although strictly he was not excused, they thought it right that he should have a pardon.

Such are the principles of our law with regard to the time of the operation of statutes.

We have shown that the legislator is bound to publish the law in as clear terms as possible, that the subject may know what the rule is to which he is bound to conform. But, however clear those terms may be, doubts must arise.

If (as Vattel observes) the ideas of men were always distinct and perfectly determined, and they expressed those ideas in terms clear, precise, and capable of one single meaning, there never would be any difficulty in discovering their intention in the words whereby they have endeavoured to express it. To understand the language they spoke would be alone sufficient: but even then the science of interpretation would not be useless. In grants, in conventions, treaties, contracts, *and in laws*, it is impossible to foresee and provide for every particular case. Certain things are provided, enacted, or agreed upon, in a more or less general enunciation. And if the expressions of the instrument were perfectly clear and precise, a right interpretation would still consist in the true application to each particular case, of that which has been determined in a general manner. But this is not all. Con-

The rule, that statutes take effect from the first day of the Session, jectures vary and produce new cases, which can be brought within the terms of the treaty or law only by inductions drawn from the general views of the contracting parties, or of the legislator. Contradictions and repugnant provisions, real or apparent, must be explained and reconciled. And ingenuity and subtile reasoning are often used by parties litigating, who endeavour to make the laws serve their purpose.[a]

By the use of laws is meant the mode of applying them to questions that are to be decided; and the application of laws frequently requires their interpretation.

Domat distinguishes two sorts of cases where it is necessary to interpret the law. One is, where we find in a law some obscurity, ambiguity, or other defect of expression. In this species of case the law requires interpretation to show its true meaning. And this kind of interpretation is limited to the *expression*, that it may be shown what the law says. The other sort of case is, when it happens that the literal sense of a law which appears clear in words would lead to false consequences and to unjust decisions, if the law were indiscriminately applied to everything that is contained within the literal meaning of the words. In this case the palpable injustice which would follow from this apparent meaning, obliges us to discover by interpretation, not what the law says but what it means, and to judge by its meaning how far it ought to be extended, and what are the bounds which ought to be set to its sense.[b] Thus we have seen that Coke lays it down that such interpretation of statutes must be made that the innocent, or he in whom there is no default, may not be damnified. So, if it be provided by a statute that any one who shall do a certain act shall suffer death, that law would not be applied to the case of a madman acting under a delusion, or a child incapable of reason. Such a case, though within the words, would not be within the intention of the law.

The real intention, when accurately ascertained, will prevail against the literal sense of the terms. Celsus says, in the Pandects, *Scire Leges non hoc est verba earum tenere, sed vim et potestatem;* and the reason and intention of the legislature will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity. On the same principles, by the Civil Law, omissions in the literal meaning of the words may be supplied by the intention. If there be anything omitted in the literal meaning of the law, which is a necessary consequence of its disposition, and that tends to give the aw its entire effect according to its intention, we may supply what is

[a] Vattel, Droit des Gens, liv. ii., chap. xvii.

[b] Domat, L. Civ., Liv. Prélim., tit. i., sect. 2.

wanting in the expression, and extend the effect of the law to what is included in its intention, though not expressed in words. Papinian says, *Quod legibus omissum est, non omittitur religione judicantium.* (L. iii., ff. De Testib.) And Julian, after observing that no law can be so framed as to include specifically and literally every case that comes within its intention, says, *Cum in aliquâ causâ sententia (legum) manifesta est, is qui jurisdictioni præest ad similia procedere debet.* But, with regard to these two rules of the Civil Law, it is necessary to state that our Courts allow themselves less latitude than the Civil Law gives, in supplying such defects in statutes. The general rule of the English Law is, that words are not to be extended beyond their ordinary sense to comprehend cases within the supposed intention of the Legislature. (Dwarris, part ii., p. 584.)

I have now given a sketch of the cases in which laws require interpretation.

The Courts of Law are entrusted with the exposition and interpretation of statutes, by the laws of this and every other country. We have next to examine in what manner they perform this important function.

It is an essential constitutional principle,—a doctrine of public law,—that Courts are not to construe laws arbitrarily. They must follow certain more or less fixed rules. These rules are called *Rules of Construction.* They have been drawn, in our law, chiefly from the Civil Law, and settled by a series of judicial determinations so as to guide and restrain the Judges in the application of statutes to the cases that arise before them.

In the present Reading we can only pursue the general principles of this important subject, which will be afterwards examined in detail.

All instruments are to be construed according to the intention of the parties; and this doctrine applies as well to Acts of Parliament as to contracts, wills, deeds, and public treaties of every description. This is a maxim of general jurisprudence. And thence it follows that some rules of construction are common to statutes and to all other instruments, public or private.

But there is this material distinction between contracts—whether public or private—and statutes. The former are constituted by the agreement and consent of two or more parties. Ulpian gives us the celebrated definition, *Conventio seu pactio est duorum vel plurium* IN IDEM, *placitum et consensus.* (L. i., § 1, ff. De Pact.) It follows that contracts must be interpreted according to the understanding, according to what was agreed to *by both parties.* But the rule for construing statutes is the intention of the Legislature considered as one

power, for they are rules of conduct prescribed by the supreme power of the State.

This doctrine with regard to contracts is well illustrated by the formula of the Roman Law, called Stipulation, which we still see in some of the ordinary services of the Church. It consists in the form of question and answer, thus:—*Quinque aureos dare spondes?* —*Spondeo.* Of this form you will find instances in the Pseudol. of Plautus, act i., sc. i., ver. 111, 116, and in act vi., sc. vi., ver. 14, and also in the Andria of Terence, act v., sc. v., ver. 48. Now Justinian lays it down, in his Institutes, (b. iii., tit. xx., § 5,) that unless the question and the answer agree and correspond the stipulation is of no avail, and no contract is entered into. Thus the contract is not constituted by what one party says, but by the question and answer together, and by the concurrent intentions of the parties directed to the same thing. This doctrine is the keystone of the Law of Contracts. By keeping this distinction in mind it will be easy for you to see what rules of constructions are exclusively applicable to statutes, and what extend to contracts, including public treaties.

The first general maxim of interpretation is well given by Vattel. It is, that nothing should be interpreted that does not require interpretation. When an instrument is conceived in clear terms, when the meaning is manifest and leads to nothing absurd, the sense which it naturally presents must be followed. In all such cases the intention of the Legislature must be found in the natural and grammatical import of the words without more.

Even if the law leads to hardship in some particular case; yet, if its intention be clear on the face of the instrument, the words of the law must be followed. We must say with Ulpian, *Quod quidem perquam durum est, sed ita Lex scripta est.*[a]

So, for instance, there is great apparent hardship in a case where a testator dies with the pen in his hand when about to sign his will and without signing it, and the law makes the instrument null; or where, by some accident, one of the witnesses did not sign in the presence of the testator. But the provisions of the law are clear, and must be applied strictly, otherwise it would be of no effect. The rigour that annuls all wills in which are wanting the formalities required by the law, is essential to that law, and to mitigate that rigour by equitable interpretation would render the law ineffectual for the purpose for which it is designed. And so it is with regard to the Statute of Frauds, and many others.

[a] L. i., § 1, ff. Qui et a quibus manumissi Liberi non fiunt.

As Domat very wisely observes, although the rigour of the law seems distinct from equity, and to be even opposed to it, it is nevertheless true, that in the cases in which this rigour ought to be followed, another view of equity makes it just. And as it never happens that what is equitable is contrary to justice, so likewise it never happens that what is just is contrary to equity. Thus, in the case supposed above, it is just to annul the will in which the formalities required by law are wanting, because an act of so much importance ought to be accompanied with legal forms providing sure proofs of its truth. And this justice has its equity in the public good, and in the interest which even testators themselves have, especially those who make their wills during sickness, that that may not be easily taken for their will which it is not very certain that they have declared so to be.[a]

Domat here very clearly explains the grounds of the well-known maxim, that no judge must be wiser than the law. Where the intention of the Legislature is clear to establish a rule, the judge must not, on any supposed ground of equity make an exception.

The provisions of the law being composed of words, we must next see what general principles govern the meaning to be put on those words.

In the first place, as municipal law is a rule of conduct, the words of the law must be understood by those to whom the law is addressed.

Thus Grotius says, "With regard to words, it must be laid down as a maxim, that, unless there be something to show that they have an unusual signification, they must have that meaning which is proper to them, not according to grammatical etymology, but according to common usage, which is the absolute master of languages."

"But as for terms of art, which are not generally understood by all, they must be explained according to the sense given to them by the professors or masters of that art."[b]

And Chancellor Kent thus states the same doctrine: "The words of a statute, if of common use, are to be taken in their natural and ordinary signification and import; and, if technical words are used, they are to be taken in a technical sense, unless it clearly appears from the context or other part of the instrument that the words were intended to be applied differently from their legal or ordinary acceptation."[c]

Sir Fortunatus Dwarris (on Stat. part ii. p. 573,) states this rule thus: "The words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use, for *jus et norma loquendi* is governed by

[a] Domat, L. Civ., Liv. Prélim., tit. i., §§ 2, 7.
[b] Grot., Dr. de la G., liv. xxi., chap. xvi., §§ 2, 3.
[c] Kent, Comm., vol. i., p. 462.

usage; and the meaning of words spoken or written ought to be allowed as it has constantly been taken: *loquendum est ut vulgus.* But if the usage have been to construe the words of a statute contrary to their obvious meaning by the vulgar tongue and the common acceptation of terms, such usage is not to be regarded."

This last passage, with respect to the effect of usage, requires explanation. It applies to cases where the words of the statute are not liable to doubt, and where consequently, as we have already seen, no artificial interpretation is allowed. There, to force upon the words a conventional meaning is rather an oppression of those concerned than a construction of the statute. Such an usage is not *usus*, but *abusus. Malus usus relinquendus est.*

And Celsus, in the Pandects, says that what has been introduced by error must not be applied to similar cases. *Quod non ratione introductum, sed errore primum, deinde consuetudine obtentum est, in aliis similibus non obtinet.* (L. 39, ff. De Legib.)

In laying down this principle, however, we must bear in mind that, where the words of a statute are doubtful, general usage may be called in to explain them. Lord Coke lays it down, in *Cromwel's case* (2 Rep. 81), in the words of the Pandects, *Optima est Legum interpres consuetudo.* And the jurisconsult Callistratus, whose words Coke quotes, expressly restricts the use of the rule to cases where there is a doubt or question as to the meaning of the Law.

It is also necessary to observe that the usage of a particular place cannot control the operation of a general statute. This was held in *R.* v. *Hogg*, 1 T. R. (Durn. & East.) There Mr. Justice Buller said, "It has been argued that this rate cannot be supported, because it has not been the usage in Ribchester to rate personal property. But we are interpreting an universal law which cannot receive different interpretations in different towns. It is the general law of the land that this kind of property should be rated; and we cannot explain the law differently by the usage of this or that place." . . . . . And the learned judge adds, "As to usage, I am clearly of opinion that it ought not to be attended to in construing an Act of Parliament which cannot admit of different interpretations. Where the words of the Act are doubtful, usage may be called in to explain them."

It follows, from these principles, that when general usage has determined the meaning of a doubtful expression, the construction so settled must be adhered to. Thus, Paulus says, in the Pandects, *Minime sunt mutanda, que interpretationem certam semper habuerunt.* (L. xxiii., ff. De Legib.) It is very important that this maxim be followed, for without its observance the meaning of words never can be settled by judicial determinations, and the law must ever be uncertain.

I have now shown in what cases artificial rules of construction are needed for the administration of the written law: I have pointed out where the use of those rules is not admissible: and I have explained the general principles respecting the way in which the words of instruments are to be understood. I have also shown the spirit of the law of the interpretation of instruments.

The particular rules by which statutes are construed will afford materials for subsequent Readings. But the general doctrines which I have explained form a separate and distinct portion of the jurisprudence of written law.

FOURTH READING.

ON THE CONSTRUCTION OF STATUTES.

In my last Reading I endeavoured to give you the fundamental doctrines on which the science of interpreting laws, and indeed all written instruments, is grounded. I showed the nature of written Municipal Laws: I explained the English Law respecting the commencement of the operation of statutes: I then showed the nature of the causes which render interpretation necessary—the cases in which it is required—and those in which it is *not* required: and I gave you the principles of law respecting the use and meaning of words, or particular expressions.

In all this process of exposition, the great European writers, whose works are acknowledged to contain the spirit of all laws,—the masters of jurisprudence, have not been neglected. Keeping chiefly in mind the law of our own country, we have derived legal doctrines and analogies from the sages of antiquity; and from the great modern writers who have best understood the science produced by the practical reason of Rome, and the philosophical abstractions and subtile logic of Greece.

The law of interpretation must now be examined somewhat more in detail. But, before doing so, I am desirous of giving some further explanation of my views respecting the duties with which I am unworthily intrusted. I do so now, because I have had the honour of delivering three Readings before this learned Society, and you have seen what my method is. You will therefore now better understand the reasons on which that method is devised.

1. Many persons, whose opinions are entitled to great respect, have said that Lectures are of no use to an English Law Student.

It would be strange that it should be so. Why should the English Law not be learned partly by oral teaching as well as other sciences? Because it depends on practice, experience, and a knowledge of cases? The same reason was given against Blackstone, when he published his Commentaries. But no man will be bold enough to deny that that illustrious judge performed, by giving us his immortal book, a

very great and inestimable service to the jurisprudence of his country. Yet his book was composed of lectures; and it is written on the avowed principle of systematizing, and bringing to principles and reasoning the stubbornly practical Law of England.

We may also appeal to a peculiarly national authority in favour of Law Lectures—the authority of ancient custom. Look round at the varied and quaint heraldry which adorns this Hall. Those escutcheons contain the bearings of the Readers of our Society, whose duty it was in former times to deliver Law Lectures.

You, among whom may be the future successors of those great men, are now called upon to support our time-honoured usage which is revived among you; and to make the best use of such means as these Readings will give you for the furtherance of the objects for which you became members of our profession.

I say this without fear of being accused of presumption, because I profess and intend to bring before you, not my own notions and opinions, but such knowledge as must be valuable to you, whether I communicate it well or ill.

I have asked why the Law of England should not be learned *partly* by oral teaching. I say partly, because those who depreciate Readings and Lectures always speak of them as opposed to and contradistinguished from the process of legal education conducted in a pleader's or counsel's chambers, in court, and by solitary reading. This is a great mistake. I admit that it is by these means that the practical lawyer is formed, and that without them no man can become a lawyer. The best-read man, coming as a pupil into a pleader's chambers, will at first find himself quite at a loss for want of that knowledge of the working of law which practice and experience alone can give.

It is by the union of different means of education that legal studies can best be raised to a high pitch of excellence. Each of those means should have its proper use, and each will have its proper value—its peculiar province,—in the formation of a sound and learned lawyer capable of fulfilling the highest duties and the administration of justice, as a judge or as an advocate.

We must admit, that legal education can be successfully conducted without any sort of academical prelections—for some of the greatest lawyers that this country ever produced have been trained without them. And Readings or Lectures never can take the place of that practical training, by which *they* attained the high rank which they hold in the legal history of their country. I refer particularly to the patient and laborious use of the time spent as a pupil in chambers. It is there that the realities of the Law are learnt, the actual working of its administration, and the practical business which the advocate must

afterwards be engaged in. On this part of a student's life his future success mainly depends. It can alone teach him things which are absolutely necessary; and it brings his reading to his mind in a manner most calculated to make a durable impression on his memory. In this last respect it is like experiment in the study of natural philosophy, which affords the easiest mode of learning and remembering the principles of science.

The use of Readings or Lectures is very different. They give you a royal road to principles; they open to you extensive views of legal science; they afford you classifications which assist the arrangement of knowledge; they present to your minds comparisons and generalizations of science; and they give you in a short space of time *results*, which have been obtained by many years of study. Thus, by combining the two methods of study to which I have referred, you begin (if I may so express myself) at the beginning of legal science and at the end together. And, at the same time, the reasons of the law, in the practice of which you are engaged, are explained to you.

Such are the objects of my labours, in which if I do not succeed it will be for want, not of zeal but of ability.

In pursuance of these reflections I shall not attempt to impart to you knowledge which you must acquire elsewhere. I shall endeavour to give you as much as possible what has been called the *rationale* of the law, the reasons and the theories on which it is constructed, the leading cases whereby it has been established; and the opinions of the civilians and jurists as well as the Laws of Justinian which illustrate and explain it.

I have already said that one of my objects is to enlarge the range of legal studies. I also wish to give you grounds to think in a liberal and enlarged manner on legal subjects, and to seek the reasons of things without being satisfied with mere authority. Even where we must submit to authority, it is very important to investigate the reasons of what authority has established. This is the mode of forming a legal mind and a judicial mind. Without it the practice of the law produces a narrowing effect on the intellect, which has rendered learned lawyers, in many instances, so inured to technical principles established by mere authority, as to be almost incapable of reasoning except from such artificial premises.

A remarkable instance of this occurred in the debates in the House of Commons, on the great question as to the right of the mother country to tax the North American Colonies which were not represented in the Imperial Parliament. After the eloquence, the wisdom, and the constitutional learning of Pitt and Fox, and all the great statesmen in the house had exhausted this momentous question, a

learned lawyer rose, and said that the real point on which the whole matter turned had been unaccountably omitted, and that he thought that he could suggest a solution of the difficulty. In the midst of the deep silence and anxious curiosity of the House, who thought that some new light was suddenly to break upon them, and show how the prerogatives of the imperial authority could be reconciled with the claims of the colonists, and the integrity and peace of the empire permanently secured, he showed that the land of the colonies in question had been originally granted and was held *ut de honore*, as of the manor of Greenwich in the county of Kent; and thence he argued that, as the manor of Greenwich was represented in Parliament, so the lands of the North American Colonies (by tenure, a part of the manor,) were represented by the knights of the shire for Kent.

The argument was highly astute and lawyer-like, but the House laughed. The honourable and learned member did not attend to the distinction which I have explained to you, between natural and positive laws, and the necessity of not extending positive laws beyond the object which they are intended to fulfil. He set up a legal fiction deduced from a positive law, and then mistook it for reason.

There are persons who hold that a lawyer's studies ought to be confined to the particular branch of the English Law in which he practises, and who by an exaggeration of the maxim—*multum legendum non multa*—seem to think that his reading can scarcely be too confined. But I believe that such narrow ideas can scarcely obtain much countenance in our days. Every man who has studied law must have felt how one branch of law assists the knowledge of the other, and how intimately they are connected together by community of principles, so as to form one great science. And so Cujacius says, *Nunquam bene percipimus usu necessarium, nisi et noverimus jus usu non necessarium.* Without the knowledge of what is not necessary for practical uses, we cannot thoroughly know that which is necessary. Both time and trouble are saved by conducting legal studies in this liberal way.

By regarding law as a great moral science, it is rendered the means of disciplining, strengthening, and enlarging the mind; making it capable of comprehending and mastering all the varied affairs of life, both public and private, and preparing it for the performance of the highest duties of the judge and the statesman. The narrow and pedantic cultivation of legal study has an opposite tendency; though peculiarly vigorous minds are able to resist the influence which produces a more or less prejudicial effect on others.

Such are the principles on which, in my humble opinion, the cul-

tivation of our English Law ought to be conducted; and those principles will ever be present to my mind in the performance of the duties with which I have been entrusted by our learned Benchers.

We will now resume the subject of the last Reading.

We have seen that the intention of the legislature is the first principle of the interpretation of the law. How is that intention to be ascertained? It is to be ascertained only by means in accordance with the rules of law. The intention must be such as the legislature has used fit words to express: and that intention is therefore to be drawn from the rules of law applied to the instrument, and is not to be sought by means of conjectures.

Dwarris refers on this subject to *Doe. dem Gwillim* v. *Gwillim*, 5 B. & Ald. 129, where Mr. Justice Park says, with regard to the interpretation of wills: "It is often extremely difficult to say what the actual meaning of a testator was. The Court is to ascertain not what the testator actually intended, but what is the meaning of the words he has used. It must be often matter of conjecture what he actually meant to be done; but there can be no doubt, whatever, what was the meaning of the words he has used." And so Lord Denman said, in *Rickman* v. *Carstairs*, 5 B. & Adol., "The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used." And the Vice-Chancellor Wigram, in his work on the admission of extrinsic evidence in the interpretation of wills, also cites *Doe dem. Templeman* v. *Martin*, 4 Barn. & Adol. 783; and 1 Nev. & Mann. 524. Thus we are not to discover the meaning of an Act of Parliament from parliamentary debates or reports, or the intentions of the framers of the instrument. Those means of explanation might indeed show the *actual* intention of the legislature, that is to say, the intention of the majority in both Houses who passed the Act: but the law must be construed and explained by rules ascertaining, not what the legislature actually intended, but what is the meaning and effect of the words which the legislature has used.

Thus, in *R.* v. *The Inhabitants of Stoke Damerel*, 7 Barn. & Cress. 168, Mr. Justice Bayley said:—"I do not know how to get rid of the words of this Act of Parliament; and where the legislature, in a very modern Act of Parliament, have used words of a plain and definite import, it is very dangerous to put upon them a construction, the effect of which will be to hold that the legislature did not mean what they expressed."

And in *R.* v. *The Inhabitants of Ramsgate*, 6 Barn. & Cress. 715, the same learned judge said:—"It is very desirable in all cases to

adhere to the words of an Act of Parliament, giving them that sense which is their natural import in the order in which they are placed." In that case the question arose on the construction of stat. 6 Geo. IV. c. 57, which provides, that no settlement shall be gained by reason of settling upon or paying parochial taxes for a tenement, unless the house, &c., of which the tenement consists, shall be occupied under such yearly hiring, and the rent for the same *to the amount of* 10*l.* be actually paid for the term of the whole year. The pauper hired a house for one year at a rent of 15*l.* The sum of 11*l.* was paid by him on account of rent: and it was argued by Pollock that the payment of rent to the amount mentioned in the statute, namely, 10*l.*, was sufficient. This construction seems to have much reason in its favour; and probably the framers of the statute intended the settlement to depend on the payment of 10*l.* But the Court held that no settlement could be gained under the statute unless the *whole rent*, though the amount be *above* 10*l.*, be actually paid. Such is the plain meaning of the words.

And, in *R.* v. *The Inhabitants of Great Bentley*, 10 Barn. & Cress. 527, Lord Tenterden said:—"We think it much the safer course to adhere to the words of the statute construed in their ordinary import, than to enter into any inquiry as to the supposed intention of the persons who framed it."

On the same principles depends the rule, that effect is not to be given to an intention which is not expressed.

Thus, in *R.* v. *Skone*, 6 East, 518, Lord Ellenborough said:—"It is no question for us, whether it would be expedient that there should be an appeal to the sessions in this case, of a conviction before two justices of the peace, for a penalty in respect of the malt duty. If there be no words of reference to any Act giving such appeal, we cannot supply the want of them. Now the clauses in the statutes of Car. II. and Geo. II. have not the word *penalties* in those parts giving the appeal; and when that word occurs in other clauses, in other respect fac-similes, it seems as if the omission were intentional; but *if it were not intended*, we can only say of the legislature—*quod voluit non dixit*."

And, in the case of *Haworth* v. *Ormerod*, 6 Q. B. Rep. 307, Lord Denman said:—"If the Legislature intended more, we can only say that, according to our opinion, they have not expressed it."

The leading principle of these cases is, that though the foundation of all interpretation of statutes is the intention of the legislature, yet that intention must be such as is manifested by the words of the statute.

It follows, from the same doctrine, that when words are used in a

statute to which the law has affixed a certain effect, the statute must be interpreted accordingly, unless there be something to show that such is not the expressed intention of the legislature.

This rule depends not only on the rule that words of art are to be construed according to the meaning given to them by the act to which they belong, but it is also founded on the principle that statutes are to be construed according to the reason of the Common Law. Unless it appear that the Act is intended to alter the Common Law, it must be interpreted according to the Common Law.

Thus, Chancellor Kent says:—"Statutes are likewise to be construed in reference to the principles of the Common Law, for it is not to be presumed that the legislature intended to make any innovation upon the Common Law further than the case absolutely required. This has been the language of the Courts in every age: and when we consider the constant, vehement, and exalted eulogy which the ancient sages bestowed upon the Common Law, as the perfection of reason and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction. It was observed by the judges, in the case of *Stowell* v. *Zouch*, Plowd. 365, that it was good for the expositors of a statute to approach as near as they could to the reason of the Common Law; and the resolution of the Barons of the Exchequer, in *Heydon's case*, 3 Co. Rep. 7, was to this effect."

Such are the general principles with regard to the effect of legal words in the statutes. And so far as regards those words, taken by themselves, there is no difference between the construction of statutes and of deeds.

But it is a most important rule, that the intent of a statute is to be deduced from a view of the whole instrument. So, Lord Coke says, in 1 Inst. 380:—"It is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers." And the same rule is laid down by Celsus, in the Pandects, *Incivile est, nisi totâ lege perspectâ, unâ aliquâ particulâ ejus propositâ, judicare, vel respondere.*

Now, all rules with regard to the construction of particular parts of statutes, are but *presumptiones juris*, which may be rebutted by a contrary intention expressed in some other part of the law. Thus, it may appear from the words of the statute that a certain expression is to be understood in a manner contrary to the rules of the Common Law.

This last doctrine constitutes a diversity between the effect of words in statutes and in other instruments, which is very important and deserves full consideration.

In wills and deeds the general doctrine obtains, that rules of construction are used as modes of determining the intention, and they therefore give way before an expressed intention leading to a conclusion contrary to the rule of construction. Thus, it is a rule of construction that words are to be understood according to their ordinary acceptation. But if it appear on the face of the instrument that the intention was otherwise, the intention must prevail.

There are, however, cases in which rules control and destroy even the express intention manifest on the face of the instrument, though it would be otherwise in a statute.

These cases are of two descriptions or classes: 1st, where the law will not allow any equivalent for words to which it gives a particular effect; and 2ndly, where the law forbids some particular mode of disposition.

The following are instances of the first class of cases. Littleton says, sect. 1, "If a man would purchase lands or tenements in fee simple, it behoveth him to have these words in his purchase, *to have and to hold to him and to his heirs:* for these words (*his heirs*) make the estate of inheritance. For if a man purchase land by these words, to have and to hold to him for ever; or to have and to hold to him and his assigns for ever; in these two cases he hath but an estate for term of life, for that there lack these words (his heirs), which words only, make an estate of inheritance in all feoffments and grants."

Here the English Law differs from the Civil Law, which gives an estate of inheritance wherever the dominion is absolutely transferred to any one without limitation. But, by the English Law, in all feoffments and grants to a man in fee (but not in wills) the word *heirs* admits of no equivalent. And Lord Coke tells us that the reason wherefore the law is so precise to prescribe certain words to create an estate of inheritance is for avoiding of uncertainty, the mother of contention and confusion. Co. Litt. 9. a. And Coke lays it down, p. 20. b., that if a man give lands or tenements to a man, and to his seed, or the issues or children of his body, yet he has but an estate for life.

And Blackstone says (bk. ii., c. 7,) that, "As the word *heirs* is necessary to create a fee, so the word *body* or some other words of procreation are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited. If therefore either the words of inheritance or words of procreation be omitted, albeit the others be inserted in the grant, this will not make an estate tail. As, if the grant be to a man and the *issue of his body,* to a man *and his seed,* to a man and his *children* or *offspring;* all these are only estates for life, there wanting words of inheritance—*his heirs.* So on the other hand, a gift to a man and his heirs male, or female, is an estate in fee simple,

and not in fee tail; for there are no words to ascertain the body out of which they shall issue. But in wills less strictness obtains.

If the Crown grants an estate contrary to the rules of law, the grant is absolutely void. For instance, if the Crown grant lands to one and *his heirs male*, this is void, for the Crown is presumed to have been deceived.[a]

There are rules of law with regard to deeds; but if it be enacted by a statute that the manor of A. shall be vested in B. C. *in fee simple* or *in tail*, this will be effectual without words of inheritance or of procreation. The reason is that the supreme power of Parliament is not bound by the Common Law, for Parliament may alter the Common Law.[b]

Thus it appears from *The Prince's case*, 8 Co. Rep. 16, that the authority of Parliament may create estates repugnant to the principles of the Common Law. In that case it was held that the Charter whereby King Edward III. granted the Duchy to Edward the Black Prince was made by authority of Parliament. And the Lord Chancellor, assisted by Coke, Ch. J., Fleming, C. B., and Williams, J., held that it would be impossible if the said charter was not established by Parliament, that the estate, either of the honour to be Duke of Cornwall or of the possessions thereof being limited in such special manner as it is, should be sufficient in law. For the limitation of both is, *Habendum et tenendum eidem Duci, et ipsius et heredum suorum Regum Angliæ filiis primogenitis et dicti loci Ducibus, in Regno Angliæ hereditarie successaris.* So that he that ought to inherit by force of this grant ought to be the first begotten and heir apparent of the King of England, and of such King as is heir to Prince Edward, and that such first begotten son and heir apparent to the Crown shall inherit the dukedom in the lifetime of his father. So that if there be king, grandfather, father and son, now, the father being the first begotten son of the grandfather, is Duke of Cornwall in the life of the King; and *eo instante* that the grandfather dies, the father is King, and *eo instante* also the son is Duke of Cornwall, which course of inheritance being against the rules of the Common Law cannot be created by Charter without the force and strength of an Act of Parliament. Coke compares this singular limitation of a dignity to the titles by courtesy enjoyed by the eldest sons of peers having supereminent dignities; though Mr. Serjeant Manning, in his *Serviens ad Legem* or *The Serjeant's case*, p. 173, treats these titles by courtesy as little better than nicknames or aliases, and likens them to the name of the Hottentot

[a] Co. Litt. 27. a.; but as to a dignity see *The Earl of Devon's case*, 2 Dow. & Cl. App. Cas. 200.

[b] Co. Litt. 27. a. notes 5, 6.

Venus, in 3 East, 135. And in the *Marquis of Carmarthen's case*, 2 Salk. 451, the Court held that the Duke of Leeds was Marquis of Carmarthen, and not his son.

But however this may be, an Act of Parliament may limit lands or tenements otherwise than the Common Law would do, and create a new estate of inheritance, as Lord Coke lays it down in his Com. on Litt. 27. a. And the limitations of the Duchy of Cornwall are contrary to the Common Law.

In other instruments it is otherwise, for we have seen that in grants and feoffments the intention to create an estate in fee or in tail must be expressed in a manner determined by the rules of law; and, therefore, unless those rules be followed, the intention, however clearly declared, is of no avail and is defeated.

We come now to the second class of cases, namely those in which the Law prohibits some particular mode of disposition.

I shall confine myself to one very important and celebrated instance, the rule in *Shelly's case*. That rule is thus stated in *Shelly's case*, 1 Co. Rep. 104. "It is a rule of Law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases *the heirs* are words of limitation of the estate and not words of purchase." Thus as Edward Shelly took an estate of freehold, and after an estate was limited to the heirs male of his body, the heirs male were held to take by descent, and not by purchase.

Thus, in any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs either mediately or immediately, the first taker takes the whole estate. If it be limited to the heirs of the body he takes an estate tail, if to his heirs a fee simple.

The freehold estate of the ancestor and the remainder to his heirs or the heirs of his body are said to coalesce and form one estate so that the heirs take in their character of heirs and by descent from the ancestor.

The great importance of the rule arises from this, that upon it depends the power of alienation by the ancestor to the exclusion of his heirs—a power which he would not possess if the heirs took not by descent from him but by purchase, which would be a title independent of his.

Preston, in his view of the rule in *Shelly's case*, p. 12, says that the rule has this circumstance of peculiarity and variance from rules of construction in general, that instead of seeking the intention of the parties and aiming at its accomplishment, it interferes in some at least if not in all cases with the presumable, and in many instances the

express intention. In its very object it was levelled against the views of the parties.

The rule was, however, not fully established to this extent until the great case of *Perrin* v. *Blake*, reported in 1 W. Black. 672; and 4 Burr. 2579.

In that case the will of the testator Mr. Williams, after a provision for the event of his wife being ensent with child, contained these words: "Item, it is my intent and meaning that *none of my children shall sell or dispose of my estate for longer time than his life*, and *to that intent* I give, devise, and bequeath, all the rest and residue of my estate to my son John Williams and the said infant for and during *the term of their natural lives*, the remainder to my brother-in-law J. G. and his heirs for and during the lives of my son John Williams and the said infant, the remainder *to the heirs of the body* of my said son John Williams, and the said infant lawfully begotten or to be begotten, &c."

The testator died leaving John Williams his only son and heir at law, and his widow was not enseint with child. The question was what estate John Williams took.

The intention was clear to give him only an estate for life. But if the rule in *Shelly's case* applied he took an estate tail. In the Exchequer Chamber it was held by a majority of three Judges that the rule did apply to this case, thereby reversing the judgment of the Court of King's Bench, pronounced by the opinions of Lord Mansfield, and Justices Willes and Aston, against that of Yates, J. A writ of error was brought in the House of Lords to reverse the judgment in the Exchequer Chamber, but it was not proceeded with.

Lord Mansfield held that John Williams took an estate for life only with remainder to his heirs successively in tail, *taking as purchasers*. The substance of his Lordship's argument, (which is given at length in the first vol. of the Collectanea Juridica, p. 318,) is contained in the proposition that the legal intention when clearly explained is to control the legal sense of a term of art unwarily used by the testator. He admitted the rule in *Shelly's case* to be clear law, but denied it to be a general rule subject to no control so as to defeat the clear and admitted intention of the testator. And he laid it down that if the words be not ambiguous, or if the declaration be plain, the legal sense of the words must give way. Thus Lord Mansfield treated the rule as a rule of construction. But the Court of Exchequer Chamber held it to be a rule not of mere construction, but of Law, and therefore subject to no control.

To make this distinction clear we must refer to the legal doctrines respecting presumptions, which you will find well explained in Voet's

Commentary on the Pandects, book xxii. tit. 3, § 15, 16. There are two kinds of presumption, namely, *presumptio juris*, and *presumptio juris et de jure*. The first is that which arises from a ruleof Law, and is held to be conclusive until the contrary be shown by some contrary presumption or proof. The second is where the Law presumes something, and disposes on the presumption, admitting no proof to the contrary. And so it is in the Canon Law.[a]

Rules of construction raise a *presumptio juris* which is controlled by the intention proved in such a way as the Law permits.

But rules of Law such as the rule in *Shelly's case* give effect indeed to the intention of the party, for all conveyances depend on the intention of him who conveys, but the law shuts its eyes to any proof of an intention contrary to the effect which the Law affixes to the words of the instrument. Thus the rule in *Shelly's case* does not apply unless the intention was to limit the estate to the heirs as a class, and as legal successors, and not as a designation of particular individuals only.[b] But the law will take no notice of any proof of an intention that the heirs as such should take by purchase and not by descent.

Thus, the rule in *Shelly's case* is in the nature of a *presumptio juris et de jure*. So in the Civil Law it is a presumption of this conclusive nature that he who knowingly pays a debt not legally due intended a donation: *Donare voluiise eum qui sciens prudens indebitum solvit*. Whether he really had such an intention is immaterial, for the Law affixes that effect to his act, and will receive no proof of a contrary intention. Thus, if he said at the time of payment, "I know this money not to be due, but I reserve to myself the remedy by law to recover it back," the rule of Law would nevertheless conclude him, and he would have no remedy. In short the law gives his act *the effect of a gift*.

In cases such as that just stated to illustrate the Civil Law, the presumption of Law is scarcely distinguishable from a legal fiction. And indeed legal fictions are of a nature nearly allied to that of presumptions of law *juris et de jure*. But a presumption is always founded on some truth, actual or probable, whereas a fiction is grounded on a supposed fact which is always and altogether feigned. (Voet, *ubi sup.* § 19.)

I have only said that the rule in *Shelly's case* is a rule of Law *in the nature* of a presumption *juris et de jure*, because the decision in the Exchequer Chamber in *Perrin* v. *Blake* is not expressly put on that ground by the authorities. But it follows from the very nature of the law of property that the effect of every voluntary alienation of

[a] Devoti Inst. Canon. tom. ii. lib. iii. tit. ix. § 28, 29.

[b] Preston on the Rule in Shelly's case, p. 70.

property must arise from an intention actual or presumed of the alienor. The fundamental rule is given in the Pandects (De Reg. Jur. L. 11): *Id quod nostrum est, sine facto nostro ad alium transferri non potest.* I have given the scientific theory on this important subject, which will very much assist the comprehension of the celebrated argument in Fearne's Treatise on Contingent Remainders respecting the case of *Perrin* v. *Blake.*

It must be evident from this explanation of these peremptory rules of construction, or rules of construction in the nature of rules of Law, that they constitute an important diversity between statutes and other instruments. To statutes they have no application except as mere rules of construction, presumptions *juris* but not *de jure*, which give way to a contrary intention of the legislature appearing clearly on the face of the instrument. Thus, if the words of the will in *Perrin* v. *Blake* had been embodied in an Act of Parliament, the heir would have taken by purchase and not by descent, for the clear intention of the Legislature would have altered the rule of Law in the particular case. But without such manifestation of intention the rule would obtain as well in an Act of Parliament as in a deed, because Acts of Parliament are to be construed according to the Common Law unless they are, and except so far as they are, intended to alter the Common Law.

I have now reached the conclusion of this Reading. I have followed, perhaps, an unusual course at least in its latter part by diverging into the province of conveyancing, and by placing doctrines in juxtaposition with each other which are more commonly considered apart. But I have done so advisedly, because I believe that great advantages arise from bringing together different branches of Law so as to induce a comparison between them, to generalize the principles of Law, and to show the relation which they bear to each other. No method can in my opinion be a more useful addition to that exclusive and comparatively narrow study of particular branches of the Law which is necessary to form a good and useful lawyer.

FIFTH READING.

Easter Term.

ON THE CONSTRUCTION OR INTERPRETATION OF STATUTES.

We have already referred to the rule thus well expressed in the Pandects:

Incivile est nisi tota lege perspecta, una aliqua particula proposita, judicare vel respondere.

On this subject Chancellor Kent writes as follows:—"It is an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from the whole, and every part of a statute taken and compared together."

And so we find it laid down in Co. Litt. 387. a. that it is the most natural and genuine exposition of a statute to construe one part of a statute by another part of a statute, for *that* best expresseth the meaning of the makers. And it was held in *Stowell* and *Zouch*, Plowd. 365, that if any part of a statute be intricate, obscure, or doubtful, the proper way to discover the intent is to consider the other parts of the act, for the words and meaning of one part of an act frequently lead to the sense of another.

This is a fundamental rule of all interpretation. I must also remind you of the other fundamental rule thus neatly expressed by a great Canonist:—

Verba clara non admittunt interpretationem, neque voluntatis conjecturam.

These two principles must be constantly borne in mind, for to the former all rules of construction are subject, and the latter shows where rules of construction are unnecessary and therefore inadmissible.

Where the words of an act are obscure or doubtful, Kent (Vol. i. p. 464) tells us that considerable importance must be given to the sense in which it was received or held by contemporaries learned in the Law. *Contemporanea expositio est fortissima in lege.* And Dwarris cites the following passage from Lord Coke:—"Great regard ought in construing a statute to be paid to the construction which the sages of the

Law who lived about the time, or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made."

But this passage must be understood subject to the rule already explained, that statutes are to be construed not by the intention of the framers of the instrument but according to the intention of the legislature collected from the instrument itself.

Kent more accurately states the law on this point in a note to the passage just cited. He says that where the penning of a statute is dubious, long usage is a just medium to expound it by, for *jus et norma loquendi* are governed by usage. The meaning of things spoken or written must be, as it hath been constantly received to be, taken from common acceptation (Chief Justice Vaughan in *Sheppard* v. *Gosnold*, Vaugh. Rep. 169). A contemporary exposition even of the constitution of the United States, practised and acquiesced in for a period of years, fixes the construction (*Stuart* v. *Laird*, 1 Cranch. 299). Thus it appears that the real doctrine is that usage commencing from the time when the act was made has great weight in the construction of statutes, for it will not be argued that a single contemporaneous decision is sufficient to overrule several later decisions.

And in a note to *Ashby* and *White*, Smith, L. C. 128, the rule is laid down as follows:—"That usage may explain the meaning of an antient statute." And several cases are there cited, among others *Bank of England* v. *Anderson*, 3 Bing. N. C., where Tindal, C. J., said, "We attribute great weight to the maxim of Law, Contemporanea expositio fortissima est in lege." And this was said with reference to a statute no older than 5 & 6 W. & M.

The same rule is beautifully laid down in the Pandects: Si de interpretatione legis quæratur, in primis inspiciendum est, quo jure civitas retro in hujusmodi casibus usa fuisset: *optima enim est legum interpres consuetudo.*[a]

And indeed the Emperor Severus decided by a Rescript that in ambiguities of laws, usage, or the authority of a constant series of concordant decisions, has force of law: *Consuetudinem aut rerum perpetuo similiter judicatarum auctoritatem, vim legis obtinere debere.*[b]

And there is another text of the Pandects which says, *Minime sunt mutanda quæ interpretationem certam semper habuerunt.*[c]

You will recognise in these celebrated texts of Law our English maxim, *Stare decisis*, the reason of which is stated in many cases in the books. Thus, in *Hodgson* v. *Ambrose*, Dougl. 323—526, Lord Mansfield said, "Whatever our opinion might be upon principle and authorities if the point were new, we all think that since this is the same case

[a] L. 37, ff. De Legib. [b] *Ibid.* L. 38. [c] *Ibid.* L. 23.

with *Coulson* v. *Coulson*, and that has stood as law for so many years, it ought not now to be litigated again. It would answer no good purpose and might produce mischief. The great object in questions of property is certainty, and if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering to it than if it were to be overturned. Many estates may be enjoyed under the authority of *Coulson* v. *Coulson*,[a] the titles to which would be shaken if the decision in that case were overruled, and the case is so generally known among conveyancers that it is impossible there should be many held under the contrary construction, because if there were they would have been controverted."[b]

Lord Kenyon said in *R.* v. *Younger*, reported in 5 Durn. & East, which was a case on the stat. 29 Car. II., c. 7, against the exercise of labour on the Lord's day: "Thirty-four years have nearly passed since the decision of the case of *R.* v. *Cox*, which informed the public that all bakers have a right to do what is imputed to this defendant as an offence. This circumstance alone ought to have some weight in the determination of this case. It would be cruel not only to the defendant, but also to those in a similar situation to him, if we were now to punish him for doing that, which the Court publicly declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years."

And Lord Kenyon said in *Schumann* v. *Weatherhead*: "Among the many cases which we have been called upon to decide, upon applications for setting aside annuities, none contains a more convenient rule of decision than that which was laid down in *Greathead* v. *Bromley*. . . . . Now unless we are prepared to rescind our opinions then expressed, that case must govern the present; for it stands directly on the same ground, in every word and circumstance. . . . . And though if we had then been as fully apprised of all the circumstances as now, it might have altered our opinion; yet it is better for the general administration of justice that an inconvenience should sometimes fall on an individual, than that the whole system of law should be overturned, and endless uncertainty be introduced. I should be sorry to see one decision in 1793, and a different decision on the same facts in 1801." Grose, Lawrence, and Le Blanc, Justices, considered

[a] *Coulson* v. *Coulson*, 2 Atk. 246.

[b] And Lord Campbell, in *Ex parte the Bishop of Exeter, in re Gorham* v. *The Bishop of Exeter*, (April 25th, 1850,) said, "Was the language of 25 Hen. VIII. c. 19, obscure instead of being clear we should not be justified in differing from the construction put upon it by contemporaneous and long-continued usage. There would be no safety for property or liberty if it could be successfully contended that all lawyers and statesmen have been mistaken for centuries as to the true meaning of the Act of Parliament."

the question as concluded by the authority of the case cited by Lord Kenyon, and that the matter having passed into *rem judicatam*, the merits of the case could not now be entered into.

In the case of *R.* v. *Deptford*, 13 East. 321, (a case on a pauper's settlement by renting a tenement) Lord Ellenborough said: "If we were sitting to hear the case of *R.* v. *Framlingham* now argued, the argument might have weight; but it having been settled nearly forty years ago, that the rent reserved (all fraud apart) is to be taken as the criterion of the value of the tenement, without reference to the payment of the rates and taxes by the landlord, we are not now at liberty to disturb that decision upon any speculative opinion." And Grose, J. said: "It is better *stare decisis*," and Bailey, J. "There is quite uncertainty enough in settlement cases; and when a point has been once decided, it is better to adhere to the decision." In some of the cases indeed, as in *Ellis* v. *Smith*, 1 Ves. jun. 16, 17, the judges have gone so far as to say that a certain proposition is *res judicata*, an expression the correctness of which may well be doubted. It is true that the rule obtains, *Res judicata pro veritate accipitur*. But it only affects the parties to the suit. The rule in the Pandects and Code of Justinian, (which is one of universal law) is that *Res inter alios acta vel judicata alteri nec prodest nec nocet*. And in the Law of England this rule has full force. But the authority of precedents springs from a different principle. They are, in the words of Cujacius, "*Non tam partes juris civilis, quam argumenta et indicia juris.*"[a]

The rule of Ulpian, *Res judicata pro veritate accipitur*, is a presumption *juris et de jure*, when the same question is in dispute again (except on appeal) between the same parties. It is a presumption *juris et de jure*, that is to say, one against which the law admits no proof.

But in other cases, though a decision of a competent jurisdiction will be presumed to be according to law, this is a presumption the weight of which in each case must be estimated by the judge, according to the principles of the law which he has to administer. I say this because the jurisprudence of different countries gives a different degree of weight to precedents, or adjudged cases. And in the law of England, the authority and use of precedents is greater than in any other system of jurisprudence.

The reason of this appears from the following passage in Blackstone's Commentaries.

After dividing the Common Law into two principal grounds or foundations,—established customs,—and established rules and maxims,—the illustrious commentator proceeds thus:

[a] Cujac. Op. tom. vii. col. 40, D, E. Edit. Venet. Mutin.

"But here a very natural and very material question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges of the several courts of justice. They are the depositories of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the *viginti annorum lucubrationes*, which Fortescue mentions, and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form part of the Common Law. The judgment itself, and all proceedings previous thereto, are carefully registered and preserved under the name of records, in public repositories, set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises in the determination of which former precedents may give light and assistance. And therefore even so early as the conquest, we find the *præteritorum memoria eventorum* reckoned up as one of the chief qualifications of those who were held to be *legibus patriæ optime instituti*. For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the Divine Law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm as has been erroneously determined. . . . . .

"The doctrine of the law then is this, that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. . . . . Upon the whole we may take it as a gene-

ral rule that the decisions of Courts of justice are the evidence of what is Common Law."

This important passage shows the peculiar weight of precedents in the Law of England. "The precedents are the evidence of what the law is." But with regard to the Civil Law it is different; for there is a body of written law which constitutes the Civil Law, and adjudged cases and commentators are used only as explanations of the meaning and effect of that law. They are, as Suarez says, *probabile argumentum*. It is presumed that a decision of a competent jurisdiction is right. It is presumed that the opinion of a received commentator is correct. But in both instances the rule obtains: *Legibus non exemplis judicandum est*. The judge is to decide according to the law, and he must give due weight to authorities without placing them on a level with the law itself. But it follows from the same doctrines that when a series of decisions have determined a principle of law, no Court ought to disturb that principle. There the presumption which militates in favour of decisions must prevail. And this is for the benefit of the commonwealth to which uncertain and changeable decisions must be injurious.[a]

I think it important to bring before you this distinction between the English Law and that of those countries in which the Civil Law prevails either in its ancient or in a codified form. The distinction is very valuable in a scientific point of view, and also for practical purposes, as it shows how necessary it must be for those who have to argue questions of Civil Law to discriminate between different authorities. There is an erroneous notion in this country that in the Civil Law, and in the Canon Law also, the authority of commentators is as great as that of precedents in our law. But this is not so. Commentators on the Civil and Canon Law are to be followed, and one preferred to another, according to their relative value and authority, and according to the correctness of their arguments and opinions, having regard to the law itself. This is that interpretation which Suarez (lib. vi., c. 1, s. 5, 6,) calls *doctrinalem interpretationem*, which, as he teaches, has not force of law, because it proceeds not from jurisdiction but from science,—*non a jurisdictione sed a scientia et judicio prudentum*. That learned and profound writer adds that as in every art the opinion of skilful persons (*judicium peritorum*) has great probability of truth, so in the interpretation of laws doctrinal interpretation has great weight of authority, in which however there may be many degrees. Such is the authority of commentators in the Civil and Canon Law.

We will return to the rules of construction applied to statutes.

[a] But see Savigny, Traité du Droit Rom. vol. i. pp. 93, 4, Trad. Paris, 1840.

In *Heydon's case*, 3 Co. Rep. 7, the Barons of the Exchequer laid down the following rules:—

"For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered.

"1. What was the Common Law before the making of the Act?

"2. What was the mischief and defect against which the Common Law did not provide?

"3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?

"And, 4th. The true reason of the remedy.

"It was then held to be the duty of the judges at all times to make such construction as should suppress the mischief and advance the remedy, putting down all subtile inventions and evasions for continuance of the mischief *et pro privato commodo*, and adding force and life to the cure and remedy according to the true intent of the makers of the act *pro bono publico*."

And in *Lyde* v. *Bernard*, 1 M. & W., Mr. Baron Parke said, "I admit that words may be construed in a sense different from their ordinary one when the context requires it, or when the act is intended to remedy some existing mischief, and such a construction is required to render the remedy effectual. For we must always construe an act so as to suppress the mischief and advance the remedy."

But this doctrine must be understood subject to the rules already laid down respecting the intention of the Legislature. Thus nothing must be *imported* into the Act to alter its effect, and the intention must be collected from the context, from the words used by the Legislature, and from the whole Act.

It is necessary to consider what was the Common Law before the statute was made, because it will thereby appear whether the statute was introductory of new law or only affirmative of the Common Law; 2 Inst. 301; 3 Co. Rep. 31. And we have already seen that statutes are to be construed in reference to the principles of the Common Law, as was held in *Stowell* v. *Zouch*, Plowd. 365.

And the reason of the Law should be known for the purpose of showing the extent of the remedy in every doubtful case.

Dwarris, p. 566, illustrates this position from the Marriage Act. There the remedy was that its enactments required the consent of the father, guardian, or mother, to the marriage of persons under age, the marriage not being by banns. Illegitimate children, being within the mischief and within the *reason* of the remedy, were held also in *R.* v. *Hodnett*, 1 T. R. 96, 313, to be within the meaning of the Act.

Another important rule is that every statute should be interpreted if possible so as to give effect to the whole of it, *ut res magis valeat quam pereat.* This is a rule of the Civil Law, applicable to all instruments. Vattel (b. ii. ch. xvii. § 283) explains it by the observation that it is absurd to put such an interpretation on words used by reasonable beings as to make them of no effect.

So Blackstone says, 1 Com. 89, "One part of a statute must be so construed by another that the whole may (if possible) stand, *ut res magis valeat quam pereat.* As if land be vested in the king and his heirs by Act of Parliament, saving the right of A., and A. has at the time a lease of it for three years, here A. shall hold it for his term of three years, and afterwards it shall go to the King. For this interpretation furnishes matter for every clause of the statute to work and operate upon."

The same rule that such an interpretation should be adopted, *ut res magis valeat quam pereat*, also applies where there is an ambiguity in the words of a statute. Thus Celsus says, *In ambigua voce legis ea potius significatio accipienda est quæ vitio caret* (L. 19, ff. De Legib.). And Julian says, *Quotiens idem sermo duas sententias exprimit ea potissimum accipiatur quæ rei gerende aptior est* (L. 67, ff. De Reg. Jur.).

With regard to repugnancies, Chancellor Kent lays down the following principles: "A saving clause in a statute is to be rejected when it is directly repugnant to the purview or body of the act, and could not stand without rendering the act inconsistent and destructive of itself. Lord Coke, in *Alton Wood's case,* 1 Rep. 47. a, gives a particular illustration of this rule, by a case which would be false doctrine with us, but which serves to show the force of the rule. Thus, if the manor of Dale be by express words given by statute to the King, saving the rights of all persons interested therein; or if the statute vests the lands of A. in the King, saving the rights of A., the rights of the owner are not saved, inasmuch as the saving clause is repugnant to the grant; and if it were allowed to operate, it would render the grant vain and nugatory."[a] The reason of this rule is, that where an exception to a proposition is co-extensive with the proposition itself, the exception may fairly be presumed to be erroneous, since the very nature of an exception implies that it is a modification of a superior proposition. Thus the exception must fail altogether.

Several acts *in pari materiâ*, relating to the same subject, are taken together and compared in the construction of them; because, as Kent informs us (p. 463), they are considered as having one object in view, and as acting upon one system. In the Roman Law Paulus lays down

[a] Kent, Comm. 462.

the rule, *Non est novum ut priores leges ad posteriora trahantur* (L. 26, ff. De Legib.[b]). As we have seen that statutes are to be construed with reference to the Common Law, so by parity of reason they are to be interpreted with reference to former statutes touching the same matters, and not repealed by subsequent statutes. "It is to be inferred," says Kent, "that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be harmonious and consistent in its several provisions." You will find an example of the application of this principle in *The Earl of Ailsbury* v. *Patterson*, Dougl. 27, where Lord Mansfield says, "All acts *in pari materiâ* are to be taken together, as if they were one law."

And Lord Mansfield held in *R.* v. *Loxdale and others*, 1 Burr. 447, that all acts which relate to the same subject, notwithstanding that some of them may be expired and not referred to, must be taken as one system and construed consistently; and the doctrine is sanctioned by Mr. Justice Park, in *Bussey* v. *Storey*, 4 Barn. & Ald.

But it must not be held that repealed or expired statutes affect the interpretation of existing statutes in the *same way* in which living statutes are to be construed as one, or consistently with each other; for an Act of Parliament, when repealed, is considered as if it had never existed (*Surtees* v. *Ellison*, 9 B. & C. 752). The use of repealed and expired statutes to interpret living ones, is historical and doctrinal, but not authoritative. They are not Law, but they show what the intention of the Legislature was at the time when they were passed; and thus may throw light on subsequent laws on the same subject. So it is often useful to consider the changes which the law has undergone for the purpose of seeing the intention of the existing law; though, as Lord Tenterden said, a repealed Act is obliterated from the judicial mind, and considered as if it had never passed.

This explanation removes the apparent repugnancy between Lord Mansfield's doctrine in *R.* v. *Loxdale*, and the rule in the Pandects, which seems to imply that posterior laws are to be interpreted only by *unrepealed*, and not by extinguished anterior laws.

Paulus says, "*Posteriores leges ad priores pertinent, nisi contrariæ sint.*" And this, as Domat shows, is a good and valuable rule. But it may often be useful to look to a repealed law for the purpose of explaining that law whereby it is repealed—as we refer to the Common Law to understand a statute altering the Common Law. And this doctrine shows the value of the study of legal history, for the full comprehension of the spirit of laws, as well as the importance of not neglecting books like Co. Litt. which is full of obsolete law. That old law, though long repealed by statutes, is still a part of the legal history

[b] Posteriores Leges ad priores pertinent, *nisi contrariæ sint. Ibid.* L. 28.

of the country, and in many ways useful, and sometimes even necessary for the full comprehension of the law of the land now in force. This use of ancient law is what Savigny calls the historical element of interpretation.[a]

There is another consequence of the rule that instruments must be construed *ut res magis valeat quam pereat*, which is thus expressed by Dwarris (p. 593):—"Where the intention of the framers of a law cannot be clearly seen, and where the meaning of the words used is obscure and doubtful—in such cases, it is said, the consequences of a particular exposition may be considered in the construction. The legislature did not mean the statute to be inoperative beyond all question; its design is not to be defeated, if it can be helped: *verba debent intelligi cum effectu.*

And thus the law must not be so construed as to produce consequences clearly absurd. Celsus says, *In ambigua voce legis ea potius accipienda est significatio quæ vitio caneti*, (L. 19, ff. De Legib.). So Coke (Co. Litt. 11. a), in enumerating the proofs and arguments of the Common Law, gives us the argument *ex absurdo*, for that therefrom shall follow an absurdity, and all statutes are to be construed by the reason of the Common Law. And so, as Blackstone teaches us (1 Com. 90), Acts of Parliament that are impossible to be performed are of no validity, for *impossibilium nulla obligatio est:* and if there arise out of them collaterally any absurd consequences manifestly contrary to common reason, they are with regard to these collateral consequences of no effect. Those consequences are moral impossibilities. And in such case the judges are to conclude that the absurdity was neither foreseen nor intended by Parliament, and therefore they are at liberty to expound the statute by equity. Thus, if an Act of Parliament gives a man power to try all causes which arise within his manor of Dale; yet if a cause should arise in which he himself is a party, the Act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But, on the other hand, we must remember the maxim, that no man is to be wiser than the law; for as we have already seen, if the intention of the legislature be clear, the judge cannot set it aside on the ground of inconvenience or absurdity. This doctrine is laid down in the cases of *Reg.* v. *Justices of Lancashire*, 11 Ad. & Ell. 157; *Rhodes* v. *Smethurst*, 4 Mees. & Wel. 63; and *Hall* v. *Franklin*, 3 Mees. & Wel. 259. He must say with the Roman Jurisconsult, "*Perquam durum est, sed ita lex scripta est.*"[b] Thus Blackstone says: "But if we could conceive it possible for Parliament to enact that he should try as well his own causes

[a] Savigny, Traité du Dr. Rom. vol. i. p. 208. Paris, 1840.

[b] L. 12, § 1, ff. Qui et a quibus manumissi Liberi non fiunt.

as those of other persons, there is no Court that has power to defeat the intent of the legislature, when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no." And in the late case of *Grand Junction Canal Company* v. *Dimes*, it was held that though the judge be interested in the suit, that circumstance will not invalidate the judgment, where a denial of justice would be the consequence of judgment not being given by him.[a]

Vattel makes the following observations on the use of the argument *ab absurdo*. (Lib. ii., c. 17, § 282.) "Every interpretation which leads to an absurdity must be rejected,—or, in other words, a meaning ought not to be given to an instrument, the result of which would be absurd; but it must be so interpreted as to avoid the absurdity. As it is not to be presumed that any one means what is absurd, it is not to be supposed that any one intended that his words should be so understood as to produce an absurdity. It is not to be presumed that he intended to make a joke of a serious act, for nothing illegal or disgraceful is presumed. The word absurd includes not only what is physically, but also that which is morally impossible, that is to say, so contrary to reason that it cannot be attributed to a man of good sense." . . . . . "It is said that a man in England married three wives to evade the law which forbids bigamy. This is no doubt a mere popular story, invented to throw ridicule on the extreme circumspection of the English, who allow no deviation from the letter of the law. But they doubtless do not think that the law ought to be interpreted in a way manifestly absurd."

On this rule, and indeed on the whole subject of interpretation, I strongly advise you to read the 16th Chapter of the Second Book of Grotius, on Peace and War, with the notes of Barbeyrac, paying attention to the references to Pufendorf; for the legal works of those two great masters of jurisprudence ought to be studied as much as possible together. And they should be read in Barbeyrac's translations, which are so valuable that they have superseded the original, as the English version of Littleton has superseded the old Norman French.

There may be some difficulty in determining in particular cases what is or is not to be held absurd. On this question no general rule can be discovered. There inconvenience is not a safe guide. "Arguments (says Story, Confl. of L. p. 17) drawn from impolicy or inconvenience ought to have little weight. The only safe principle is to declare *ita lex scripta est*, to follow and to obey. Nor if a principle so just could be overlooked, could there be well found a more unsafe

[a] 12 Beav. 63.

guide in practice than mere policy and convenience. Men, on such subjects, complexionally differ from each other; the same men differ from themselves at different times. The policy of one age may ill suit the wishes or the policy of another. The law is not to be subject to such fluctuations." This is sound doctrine: where the intention is clear, the judge must not on the ground of inconvenience reject that intention, for he is not to make but to interpret and apply the law. But the rule holds good which I have already cited from the Pandects: *In ambigua voce legis, ea potius accipienda est significatio quæ vitio caret.* Where the law is capable of more than one meaning, that is to be preferred which is liable to no inconvenience and leads to no vicious effect. And this is the way of discovering the real intention. Celsus adds,—*præsertim cum etiam voluntas legis ex hoc colligi possit.* And thus Gajus says (L. lvi., ff. De Reg. Jur.), *Semper in dubiis benigniora præferenda sunt.* And Celsus says (L. xxiii., ff. De Legib.), that laws are to be interpreted mildly, that is to say so as to produce no hardship, or in favour of mercy, provided the intention be preserved. *Benignius leges interpretandæ sunt, quo voluntas earum conservetur.* We shall see in the next Reading the application of this rule to penal statutes.

SIXTH READING.

ON THE CONSTRUCTION OF STATUTES.

With this Reading I shall conclude the subject of the construction of statutes. It may perhaps be observed, at the termination of this Reading, that I have by no means exhausted the subject; and that I have omitted cases and rules respecting this branch of law. I have done so advisedly,—and for this reason:—I never proposed to read to you a complete treatise on the subject in question; and I do not suppose that my Readings can be made a substitute for the diligent perusal of books of reference, such as Sir F. Dwarris's book on Statutes, and reference to the cases cited there and collected in the digests. My object is of another nature. It is to present to you a comprehensive view of a particular branch of law, in a form different from that of the text-books; to expound it by a process of comparison with other systems of law; to explain doctrines and theories, with their grounds and consequences; and for those purposes to proceed with an argumentative and dialectical method.

By these means I hope to furnish you with such scientific knowledge as will materially assist you when you go to the text-books themselves. Thus you will be furnished not only with a general plan of the subject, but with a clue to its details. When you have to argue on contradictory cases, you will the more readily see their bearing and the use which you may make of them, because you have applied your minds to the principles which are the reasons of those cases, or from whence those reasons are drawn. It is by this species of study, based on reasoning and argument, that a *legal mind* is acquired, which is most valuable, not only to a lawyer, but to persons in every station and in every profession. How often do we find men, learned, highly educated, and well-meaning, but who for want of this power of argument and dialectical thought, are bad men of business, because they take a narrow and one-sided view of things, or keep going over the same ground, not seeing the bearing of arguments against the view which they have adopted. Much that we commonly call obstinacy may be traced to this defect. To avoid it, I believe the best remedy

is to exercise the mind in the dialectical study of Law—treated as a practical branch of philosophy.

I shall perhaps here be answered by a claim in favour of mathematical science, as the best training for the mind of a lawyer and a judge. To this claim I make the following reply:—

It is undoubted, that without strong reasoning powers, it is impossible to excel in legal or in mathematical science, and a proficiency in mathematics may therefore be a good ground of prognosticating success in legal study. On the same principle, mathematics, by exercising the reasoning faculties, and thus strengthening them, must be a good means of training for legal study. But these are not sufficient grounds for arguing either that a lawyer must be a mathematician, or that mathematical studies are the best of all preparations for legal studies; if mathematics be considered not merely as an exercise calculated to strengthen the reasoning part of the mind, but as a model on which to form a legal habit of the intellect. Jurisprudence and mathematics are both abstract sciences; but the former is a moral science as contradistinguished from the latter, which is an exact science. Now, in exact or mathematical science, the train of reasoning is single, and composed of certain positive indivisible propositions, each of which is capable of being insulated, and is absolutely true or false in itself. Hence it can be looked at in but one point of view. Every mathematical truth is capable of being tried by an invariable rigid and infallible test. But the characteristics of moral science are the very reverse. Thus, upon almost every legal question, the arguments by which the disputed point is to be discussed are several and multifarious. Every question is to be looked upon in a variety of points of view, and the abundance of arguments shows the talent and learning of the jurisconsult. Thus Burke says, "The excellence of mathematics is to have but one thing before you: but he forms the best judgment in all moral disquisitions, who has the greatest number and variety of considerations in one view before him, and can take them in with the best possible consideration of the mere results of all." [a]

This observation is confirmed by Grotius, b. ii., chap. xxiii., § 1, of his great work. And the same distinction is thus well expressed by that learned and profound Italian writer, Cremani, in his treatise on Criminal Law (lib. i., pars ii., cap. xiii., § 3): "It is necessary to observe, that things of a moral nature do not always appear so absolutely or so clearly as those that belong to mathematical science, which so separates form from matter, that there is no mesne between two forms,—as, for instance, there is nothing between a right line and a

[a] Burke's Speech in the House of Commons, May 8, 1780.

curve. But in moral science, adjuncts and circumstances, though very slight, vary the matter, and the forms or propositions in question usually have something mesne which approaches more or less to one or the other extreme." And Grotius (liv. ii., c. xxiii., § 1,) (following the doctrine of Aristotle) shows, on the same principle, the distinction between the degrees of certainty of moral and of mathematical science. And Molineus says, *Modica circumstantia facti, magnam diversitatem juris inducit.*

Almost every legal position is relative, and its correct appreciation depends upon a power of comparison, or weighing one argument against another, and embracing in the mind all the arguments juxtaposed one to the other. This is legal judgment. There are, indeed, some legal propositions capable of mathematical demonstration; but in by far the greater number of instances, legal questions are only to be decided by comparative appreciation and judgment of and upon a tissue of more or less numerous arguments.

In the science of politics, or government, in all its branches, the same principle is applicable. They depend for the most part on a balance of probabilities, by the comparison of different arguments one with the other. And so it is with a great part of the business of life.

By way of corroboration of these views respecting mathematical studies, it is worth mentioning that the Chancellor D'Aguesseau says nothing of mathematics in his plan of legal education, though himself very skilful in the exact sciences. D'Aguesseau, it is true, speaks of mathematical order in law, and it is obvious that as in both sciences the argument is *a cognito ad incognitum*, there must be a certain method common to both; but the diversity of their natures must not be forgotten in applying a mathematical method to jurisprudence. The reasoning in both is governed by logic, which is thus a connecting link between them. But that reasoning is of a different nature in each, as Burke shows.[a]

These reflections sufficiently show that, besides the process of learning what the law of a particular country is (which is best accomplished here by diligent study of books, attendance in Court, and above all in a pleader or counsel's chambers, and then by practice), there is another method highly important as an auxiliary to the former, and as a means of acquiring a legal and judicial mind. I mean the study of the law, in the way which Burke indicates, as the best for the pursuit of all moral science, by bringing a great variety of considerations into one view, by comparison, by the dialectical investigation of doctrines and

[a] And see Domat, Droit Public, L. i., tit. vii.

principles, and the analysis of the grounds and reasons of the law. This portion of the cultivation of legal science is peculiarly fitted for academic teaching, and I conceive it to be my especial province in the performance of the duties of Reader.

We will now resume the subject of the construction of statutes.

There are two ways of interpreting instruments in cases where the undetermined nature of their expressions admit of some latitude, and in which those expressions may be understood and interpreted;—either in an extensive sense, or in a strict and confined sense.

To this part of the subject belongs that famous distinction between things of a favourable and things of an odious nature, which has been used by the civilians, jurists, and canonists, and which is adopted in our own law. This distinction between favourable matters, in which a liberal interpretation should be followed, and odious or unfavourable matters, wherein a strict and confined interpretation is requisite, applies to some extent to all instruments, and demands consideration.

Domat thus states the Civil Law: "The laws which are in favour of that which the public good, humanity, religion, the liberty of making contracts and testaments, and other such like motives, render favourable, and those which are made in favour of any persons, are to be interpreted in as large an extent as the favour of these motives joined with equity is able to give them; and they ought not to be interpreted strictly, nor applied in such a manner as to be turned to the prejudice of those persons in whose favour they were made."

"The laws which restrain our natural liberty, such as those which forbid anything that is not in itself unlawful, or which derogate in any other manner from the general law; the laws which inflict punishments for crimes and offences, or penalties in civil matters; those which prescribe certain formalities; the laws which appear to have any hardship in them; those which permit disinheriting, and others of the like sort, are to be interpreted in such a manner as not to be applied beyond what is clearly expressed in the law, to any consequences to which the laws do not extend. And on the contrary, we ought to give to such laws all the temperament of equity and humanity that they are capable of."[a] And the learned writer cites many texts from the Pandects in support of these propositions.

The following is the doctrine of Grotius.[b] "Promises regard *favourable* things, or *odious* things, or things partly of the one nature and partly of the other. Things favourable are those which are governed by the principle of equality, or which tend to the common utility, so that the greater is that utility, the more favourable is the nature of

[a] Domat, Loix Civ. Liv. Prélim. §§ 14, 15.

[b] Grot. Dr. de la G., liv. ii., ch. xxvi., § 10.

the transaction. Thus, that which contributes to forward peace is more favourable than that which leads to war. So a defensive war is more favoured than one of an opposite nature."

"Those things should be regarded as odious which are not governed by equality, being onerous to one of the parties only, or more onerous to one than to the other; those which contain a penalty; those which would render the instrument null and without effect; and those which make some alteration in things already established and determined."

"If anything partakes of both characters, as, for instance, where it alters what has been determined, but it does so for the advancement of peace; it may be held to be favourable or odious, according to the amount of the benefit resulting therefrom, or according as the alteration is more or less considerable; so that, *cæteris paribus*, the favourable character has the preference."

The same doctrines are laid down by Pufendorf;[a] and upon them Grotius grounds the following rules:—

"1. With regard to things which are not odious, the terms used ought to have all the extent of meaning of which they are susceptible, according to common usage; and if any term has several significations, the most general should be preferred."

"2. With regard to things altogether favourable, if he who speaks understands law, or if he be guided by the advice of persons learned in the law, the terms used should have that meaning which belongs to them, not only in common usage, but also according to legal usage and the meaning of law."

"3. But recourse ought not to be had to a sense altogether unusual, unless it be indispensable to do so to avoid an absurd result, or the nullity of the engagement."

"4. On the contrary, the meaning of the terms must be restricted, even beyond what their proper meaning imports, when it is requisite to do so for the purpose of avoiding some injustice, or some absurdity. But if there be no such necessity, but a manifest equity or utility resulting from the restriction, the strict sense which the signification of the terms imports must be adhered to; unless there be some circumstance requiring something more."

"5. With respect to things odious, even a somewhat figurative sense may be admitted for the purpose of getting rid of the onerous consequences of the strict and literal meaning."

Barbeyrac, the translator of Grotius and Pufendorf, has, in his notes to those books, raised objections to the distinction between matters

[a] Pufend. Dr. des Gens. liv. v., ch. xii., § 12.

odious and favourable; but they are thus satisfactorily answered by Vattel[a]:—

"Some writers have objected to this distinction. Doubtless, because they did not see it in the right light. In fact, the definitions which have been given of what is favourable and what is odious are neither entirely satisfactory nor easily applied. After having maturely considered what the most judicious authors have written on the subject, I conceive the whole question to be reducible to the following positions, which convey a just idea of that famous distinction. When the provisions of a law or of a convention are plain, clear, determinate, and attended with no doubt or difficulty in the application, there is no room for any interpretation or comment. The precise point of the will of the legislature, or of the contracting parties, is what we must adhere to. But if their expressions are indeterminate, vague, or susceptible of a more or less extensive sense,—if that precise point of their intention cannot, in the particular case in question, be discovered or fixed by the other rules of interpretation, we must presume it according to the laws of reason and equity; and for this purpose it is necessary to pay attention to the nature of the things to which the question relates. There are certain things of which equity admits the extension rather than the restriction; that is to say, that with respect to those things, the precise point of the intention not being discovered in the expression of the law or the contract, it is safer, and more consistent with equity, to suppose and fix that point in the more extensive than in the more limited sense of the terms, to give a latitude to the meaning of the expressions than to restrict it. These are the things called favourable. Odious things, on the other hand, are those, the restriction of which tends more certainly to equity than the extension. Let us figure to ourselves the intention of the legislature, or the contracting parties, as a fixed point. At that point precisely we should stop, if it be clearly known; if uncertain, we should at least endeavour to approach it. In things favourable, it is better to pass beyond that point than not to reach it; in things odious, it is better not to reach it than to pass beyond it."

The doctrine of the Canon Law, which agrees with the Civil Law on this subject, you will find in the treatise of the great Canonist, Anacletus Reiffenstuel, lib. i., tit. ii., § 436, &c., where he very acutely explains on what principles the distinction in question should be applied. And so Sanchez, in his celebrated book, *De Matrimonio*, lib. i., disput. i., § 4, shows how it is to be decided what things are favourable and what are odious. Vattel also explains at some length

[a] Vattel, Dr. des Gens. liv. ii., c. xvii., § 300.

the principles laid down by Grotius. But we have sufficiently considered the general principles and the chief points of the subject. They are founded on a *presumptio juris* of the intention of the legislature, or (as the case may be) of the party or parties to the instrument. The law presumes that that intention must be to interpret strictly those things which are of an odious, and liberally those which are of a favourable nature. This is the reason of the law on which all questions touching the liberal or strict interpretation hinge.

With regard to grants of the Crown, there is an important diversity between the Civil Law and the Law of England. This is a matter of public law, and must, therefore, not be passed over.

Domat says:[a]—"The favours and grants of princes are to be favourably interpreted, and ought to have all the reasonable extent that the presumption of the liberality natural to princes can give them; provided that they be not extended in such a manner as to cause prejudice to other persons." And so Javolenus, in the Pandects, says:—*Beneficium imperatoris quam plenissime interpretari debemus*, (lib. iii., ff. De Constit. Princip.) And Paulus decides that if any one obtain a grant from the Emperor simply to build in a public place, that grant is not to be construed to enable the grantee to build *cum incommodo alicujus*, to the injury of any third party.[b] Such are the general rules of the Civil Law, to which however there are some qualifications, for an explanation whereof I must refer you to Voet's Commentaries on the Pandects, lib. i., tit. iv.

In the English Law however the doctrine is different, for all grants of the Crown are interpreted strictly; that is to say, most favourably for the King. This you will find in Comyn Dig. Grant. G. 12. Thus, as you will find it laid down in Finch's Law, b. ii., p. 101, the King's grant shall not be taken to two intents, that is, shall not enure to any other intent than that which is precisely expressed within the grant. And so, if the King grant an office for life to an alien, it is nothing worth; for the grant cannot enure to make him a denizen and render him capable of holding the office.

Such is the general rule of our law, to which however there are limitations. The grant of the Crown is to be construed *ut res magis valeat quam pereat*, and must receive that interpretation which will give it effect; for that will be more for the benefit of the subject and the honour of the King, which is to be more regarded than his profit. This is laid down by Comyn, who cites 9 Rep. 131. a; 10 Rep. 67. b; 6 Rep. 6: and Blackstone, 2 Com. ch. xxi., p. 347, says that where the King's grants are not at the suit of the grantee, but *ex speciali*

[a] Loix Civ. Liv. Prélim., tit. i., sect. ii., § 17.

[b] L. ii., § 16, ff., Ne quid in Loco Publico.

gratia, certa scientia, et mero motu regis, then they have a more liberal construction. The grants of the Crown are therefore not held so favourable by the English as they are by the Imperial Law. The reason of this is that the liberalities of an arbitrary monarch are naturally to be construed more widely than those of a limited sovereign, who must act by the advice of responsible servants. The Roman Emperors however professed to follow the law, and their grants were construed by the rules of law, for the Emperors Theodosius and Valentinian declare, *Digna vox est majestate Regnantis legibus alligatum se principem profiteri. . . . . Et magis Imperio est submittere legibus Principatum,* L. iv., Cod. De Legib. et Constitut.

We come now to consider the application of the principles of the civil law and of general jurisprudence respecting strict and favourable interpretation in the English Law.

It has already been shown that the sense or spirit of the act is to be regarded, and that the judge should construe the act so as to suppress the mischief and advance the remedy. Thus a remedial act should be liberally construed, so as to extend the remedy. And so it was held in the House of Lords, in *Johnes* v. *Johnes*, 3 Dow. 15, that in the case of a remedial statute all is to be done in advancement of the remedy that can be done in a way consistent with any construction of it.

Of this there is an instance in *Magdalen College case*, 11 Rep. 67. The question was whether the Queen was bound by the general words of the statute 13 Eliz. c. 10, avoiding "all leases, gifts, grants, feoffments, conveyances, or estates to be made, done, or suffered by any master and fellow of a college to any person or persons, bodies politic or corporate, other than for the term of twenty-one years, or three lives," &c. The master and fellows had granted certain premises by indenture to the Queen, her heirs and successors, for ever, with condition that she should, before a specified day, convey and assure them to Baptist Spinola, a merchant of Genoa. The Queen was held bound by the act. And Lord Coke says, "The act being general, and made to suppress fraud, it shall bind the Queen, and the Queen being included in the words (bodies politic), if she shall be exempt, it ought to be by construction of law; and as this case is, the law shall not make such construction for reasons apparent in the act itself; *scilicet*—the Parliament have adjudged long leases made by colleges to be unreasonable, and the law, which is the perfection of reason, will never expound the words of the act against reason. It was never seen that an act made for the maintenance of religion, advancement of learning, and exhibition of poor scholars (and therefore to be favourably expounded), should be so construed, that a bye-way should be left by which the said great and dangerous mischief should be left open, and the neces-

sary and profitable remedy be suppressed, and the Queen made an instrument of wrong.

This case shows an important exception to the general rule, that though the Crown may avail itself of the provisions of any Act of Parliament, it is not bound by such as do not expressly name the Crown. The exception is thus stated in Chitty's Treatise on the Prerogative, p. 382:—"To this rule however there is a most important exception, namely, that the King is impliedly bound by statutes passed for the public good; the relief of the poor; the general advancement of learning, religion, and justice; or to prevent fraud, injury, or wrong." This is the doctrine which we have seen laid down by Domat respecting laws which ought to be favourably construed by an equitable interpretation. And the maxim of the Civil Law is *Summa est ratio quæ pro religione facit.*

Penal statutes, on the contrary, receive a strict interpretation in favour of the subject. Paulus says, in the Pandects, *In pœnalibus causis, benignius interpretandum est,* L. clv., ff. De Reg. Jur. The accused ought to have the benefit of a doubt in law as well as in fact, so far at least that the letter of the law is not to be extended by equity. And thus Ulpian lays down this rule on the authority of a rescript of the Emperor Trajan—*Satius est impunitum relinqui facinus nocentis, quam innocentem damnare.* L. v., ff. De Pœnis.[a]

Of this strict interpretation of penal statutes Blackstone gives us the following remarkable instances:—"The statute 1 Edw. VI. c. 12, having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal one horse, and therefore procured a new act for that purpose in the following year. And to come nearer to our own times, by the statute 14 Geo. II. c. 6, stealing sheep *or other cattle* was made felony without benefit of clergy. But these general words, 'other cattle,' being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next session, it was found necessary to make another statute, 15 Geo. II. c. 34, extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name."

Dwarris (p. 634) lays it down that a penal law shall not be extended by equity; that is, things which do not come within its words shall not be brought within it by construction. The law of England does not allow of constructive offences, or of arbitrary punishments. No man incurs a penalty, unless the act which subjects him to it be clearly both within the spirit and the letter of the statute imposing such penalty.

[a] And see Savigny, Tr. de Dr. Rom., vol. i., pp. 223, 224, n. (*i*). Paris, 1840.

"If these rules are violated," said Best, C. J., (in the case of *Fletcher* v. *Lord Sondes*, 3 Bing. 580,) "the fate of accused persons is decided by the arbitrary discretion of the judges, and not by the express authority of the laws."

But still the intent is to be regarded: which is a primary rule; and that occasioned it to be said that equity knows no difference between Penal Laws and others. The question is, Does a case come within the meaning of the words? Thus the enactment that made killing a master treason, was held to include a mistress. Hardres, 208; Plowd. 85.

If the statute 1 Edw. VI. had been that he that should steal one horse should be ousted of his clergy, then there would have been no question if a man had stolen more than one horse, according to the rule of the Civil Law, *In eo quod plus sit semper inest et minus*, L. cx., ff. De Reg. Jur. And it is a maxim of the Civil Law that the accused person is looked upon with more favour than the accuser. Gajus says, *Favorabiliores rei potius quam actores habentur*, L. xxv., ff. De Reg. Jur. Thus President Faber, in his comment on that law, shows that, according to the laws of the Romans and of the Athenians, where the judges were equally divided as to the innocence or guilt of the prisoner, he was acquitted. And the rule of the Canon Law is, that where the rights of the parties are doubtful, *Reo favendum est potius quam actori.* The famous rule of our law, taken from the Civil Law, *Actore non probante reus absolvitur* is applicable to the doctrines which I have just been explaining.

The Canon Law respecting the interpretation of penal statutes agrees with the English Law; and, as well for the sake of the very lucid explanations to be found there, as because of the use of the Canon Law in expounding canons, and statutes of colleges and other bodies of that nature, it is worth while to look into the works of the canonists where they treat of this matter, especially Anacletus Reiffenstuel, lib. i., tit. ii., sect. xvii.

Where the Penal Law is plain, this strict interpretation is not used. In *Rex* v. *Hodnett*, 1 Term Rep. 96, Mr. Justice Buller said, "We are to look to the words in the first instance, and where they are plain, we are to decide on them. If they be doubtful, we are then to have recourse to the subject-matter." We must follow the meaning of the words and the obvious intention of the legislature. Thus, on the bribery acts, to satisfy the term "*procuring*," the vote must be actually given; but it is otherwise with regard to the word "corrupting," for the corruption is complete, though no vote be actually given, 3 Burr. 1235.

The case cited above, from Blackstone's Commentary, where the words "sheep or other cattle" were held to be too loose to create a

capital offence, except in the specified case of stealing sheep, is also grounded on another rule, namely, that if general words follow an enumeration of particular cases, such general words are held to apply only to cases of the same kind as those expressly included. Dwarris (p. 636) observes on this case, that until the legislature distinctly specified what cattle were meant to be included, the judges felt that they could not apply the statute to any other cattle but to sheep. By the 15th Geo. II. c. 34, the legislature declared that it was doubtful to what sorts of cattle the former act extended besides sheep, and enacted and declared that the act was meant to extend to any bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever. The legislature, by the same act, declared that it was not to extend to horses, pigs, or goats, although all these are cattle. Yet horses are cattle within the Black Act, and bulls are not cattle within the 3rd Geo. IV. c. 71.

It appears, therefore, that the judges were by no means over scrupulous in refusing to include any but the specified beasts—sheep, under the general words cattle. As it turned out, the intention of the legislature was not extended to all the beasts included in the common, or even in the legal, description of *cattle.*

Acts imposing a burthen on the public must also be construed strictly; so that any ambiguity will be interpreted in favour of the subject. And so Lord Tenterden held, in *Tomkins* v. *Ashby*, 6 Barn. & Cress. 541; and Lord Ellenborough, in *Warrington* v. *Tarbut*, 8 East, 242. And on analogous principles Lord Ellenborough, in *Gildwit* v. *Gladstone*, 11 East, 675, which was an action for dock dues, said, "If words will admit of different meanings, it will be right to adopt that which is more favourable to the interest of the public, and against that of the company; because the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive; and because the public ought not to be charged, unless it be clear that it was so intended." And Lord Tenterden, in the *Dock Company at Kingston-upon-Hull* v. *Browne*, 2 Barn. & Adol. 58; and Lord Chief Justice Tindal, in *Parker* v. *The Great Western Railway*, Law Jour. 1844; 7 Scott, New Rep. 835; laid down the same principle.

It is important to observe that Lord Ellenborough, in the case of *Gildwit* v. *Gladstone*, just cited, gives as one of his reasons, that the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive. This is somewhat different from the principle of the rule given by Lord Coke, Co. Litt. 36. a.; *Verba chartarum fortius accipiuntur contra proferentem. A deed shall be construed most strongly against the grantor.* The public

are the grantors of the dues in the case under consideration, yet the act is construed in favour of the public. But Lord Ellenborough looked upon the company as bargaining with the public and stipulating for the dues; and he followed the rule *verba interpretantur contra proferentem,* on which indeed Lord Coke's rule is founded. And he decided according to the rule of the Civil Law, *verba contra stipulatorem interpretanda sunt;* and for the same reason, namely, *quia stipulatori liberum fuit verba late concipere;* because he who stipulated was at liberty to use extensive words, and he should have expressed clearly what he stipulated for. And so it is laid down by Coleridge, J., in *Howard* v. *Gossett,* Carrington & Marshman, 380, that it is a maxim in the construction of pleadings, that everything shall be taken most strongly against the party pleading. And so it is in the Civil and Canon Law.

The doctrine of Lord Ellenborough, that the company were bargaining parties with the public, is in accordance with that laid down in many cases, that private acts are parliamentary contracts. The leading case on this subject is *Blakemore* v. *The Glamorganshire Canal Company,* 1 Mylne & Keene, 162. See also *R.* v. *Cumberworth,* 3 Barn. & Adol. 108, and *R.* v. *Edge Lane,* 4 Adol. & Ell. 723.

Lord Eldon, in the leading case just cited, said, "When I look upon these Acts of Parliament, I regard them all in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them. And I have no hesitation in asserting that, unless that principle be applied in construing statutes of that description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such Acts of Parliament have now become extremely numerous, and from their number and operation they so much affect individuals, that I apprehend those who come for them to Parliament, do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else."

I have now explained the principal rules laid down by our Courts for the interpretation of statutes. I have done so with the object of making reference to the text-books, where all the rules with the cases adjudged upon them are to be found, easy and profitable. And I have also endeavoured to give you the chief doctrines laid down by the Roman Law, and by the jurists on the same subject, from whence the reasons of our own law can best be understood.

SEVENTH READING.

ON THE BOUNDARIES OF THE JUDICIAL POWER, AND LEGISLATIVE INTERPRETATION.

HAVING concluded the subject of the judicial exposition of written law under the guidance of rules of construction, it seems reasonable to consider the boundaries of the judicial authority—a subject of great difficulty and importance.

I shall also advert to the interpretation of written laws, not by judges, but by the legislative power.

The fundamental principle defining the power of the judge to expound law is this—the judicial function does not extend to *make* law: it is restricted to applying the law, which necessarily involves the duty of interpreting the meaning of the law. Thus the Italian jurist Lampredi says, "To the office of the judges belongs the interpretation of the laws. That interpretation here means a declaration of the judge, whereby he pronounces that a particular fact regarding which a controversy exists, is (or is not) contemplated by the particular law which constitutes a general rule."

So Cicero says, *Vere dici potest magistratum legem esse loquentem: legem autem mutum magistratum.*[a] And Justinian says (Inst. lib. iv., tit. xvii., princ.), "The judge must above all things take care not to decide otherwise than is provided by the laws, or constitutions, or customs:" on which passage Vinnius observes, that the judge is the minister and not the master of the law. And St. Augustine thus very neatly expresses the duty of the judge, *Non licet judici de legibus judicare sed secundum ipsas.* Thus Savigny observes, that the general motive of a law must not be made the basis of an interpretation showing an impropriety in the terms of the law, and rectifying it. The use of that method has a character more legislative than doctrinal, for it determines not what the law provides, but what it ought to provide.[b]

With these principles the Law of England agrees: but here the

[a] Cic. de Leg., lib. iii., § 1.

[b] Savigny, Tr. de Dr. Rom. vol. i., pp. 232, 233, 315. Paris, 1840. He observes that the Romans did not always clearly distinguish between the interpretation and the formation of law, p. 233.

subject requires rather minute investigation. And we must separately examine their application to the Written and to the Common Law. And first of the Written or Statute Law.

We have seen that judicial power cannot give effect to an intention of the legislature not expressed. Lord Ellenborough said, in *R.* v. *Skone*, 6 East, 518, "We can only say of the legislature, '*quod voluit non dixit.*'" And in the case of *Haworth* v. *Ormerod*, 6 Q. B. Rep. 307, Lord Denman held the same doctrine: "If the legislature intended more, we can only say, that according to our opinion they have not expressed it."

And there are cases in which the expressed intention of the legislature is opposed to the probable intention, and the judges are obliged to sacrifice the latter to the former.

Thus, in the case of *Rex* v. *Recorder of Bath*, 9 Ad. & El. 837, the judges were (as Lord Brougham observes) obliged to decide against a right of appeal plainly intended to be given, but which was given only by reference to another act that did not give it; and they lamented that the legislature had proceeded by way of reference instead of directly telling what it meant.[a]

We have also seen that a *casus omissus* in a statute cannot be supplied by a Court of Law. The judges (as you will find in *Jones* v. *Smart*, 1 T. R. 51,) are bound to take the Act of Parliament as Parliament has made it. And Lord Coke, in 5 Rep. 38, lays it down that *casus omissus et oblivioni datus, dispositioni communis juris relinquitur:* a case omitted and forgotten by the legislature is left as at Common Law. And so, in the case of *R.* v. *Barham*, 8 Barn. & Cress. 104, it was held by Lord Tenterden that it is better to defeat the object of a statute than to put upon it a construction not warranted by the words of the act. And, in *Notley* v. *Buck*, 8 Barn. & Cress. 160, his Lordship said, "The words may probably go beyond the intention; but if they do, it rests with the legislature to make an alteration; the duty of the court is only to construe and give effect to the provisions." Such is the doctrine of the Law of England, with regard to the limits of the judicial power in the interpretation and exposition of statutes.

In the United States of America the same principles obtain; but the jurisprudence of that country contains a peculiar doctrine with regard to the relative functions and province of the legislative and the judicial powers, which well deserves our consideration.

The principle of the English Constitution, that Parliament is omnipotent, does not prevail in the United States; though, if there be

[a] Letter to Sir J. Graham, 1849, p. 34.

no constitutional objection to a statute, it is in that country absolute and uncontrollable.[a] In the case of *Osborne* v. *The Bank of the United States*, J. Wheaton's R. 866, Chief Justice Marshall said, that "the judicial department has no will in any case. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discovered, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge: but always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." In these general principles the laws of the two countries concur.

But the American Courts are invested with a jurisdiction unknown to the constitution of this country. The constitution of the United States is a written constitution, erected by delegation of powers from the people to the government; and the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. The constitution being an instrument of limited and enumerated power, it follows that what is not conferred is withheld, and belongs to the state authorities if vested by their constitutions of government respectively in them; and if not so vested, it is retained by the people as part of their residuary sovereignty. The government of the United States is not confined to the exercise of *express* powers (as was the case with the confederation), though all its powers are limited and enumerated by the instrument whereby they are delegated; for it was thought impossible, without inconvenience, to confine a government to the exercise of express powers. And it is indeed a general principle, that a body politic possesses all powers incident to its corporate capacity, though not absolutely expressed.[b] This is in accordance with the principle of the celebrated rule of the Civil Law, *Mandatâ jurisdictione, ea omnia mandata intelliguntur sine quibus jurisdictio exercesi non potest.* And this principle is to be found in the important cases of *Kielley* v. *Carson*, 4 Moore, Priv. C. Rep. 63, and *Beaumont* v. *Barrett*, 1 Moore, Priv. C. Rep. 59.

It follows from these fundamental principles, which indeed belong to every federal polity, that the constitution is the supreme law which is the test of the validity of all other laws. And the principle so well aid down by Montesquieu that the legislative must be separated from

[a] Kent, Comm. vol. i. p. 448.
[b] Story, Comment. on the Const. b. iii., c. xliv., p. 752.

the judicial power,[a] applies to the instrument of the constitution. It follows that the power of interpreting the laws vested in the national courts involves necessarily the function to ascertain whether they are conformable to the constitution or not; and if not so conformable, to declare them void and inoperative. As the constitution is the supreme law of the land, it becomes the duty of the judiciary, in a conflict between the constitution and the laws, either of congress or of the states, to follow that only which is of paramount obligation. This, as Professor Story observes, results from the theory of a republican government; for otherwise the acts of the legislative and executive powers would in effect become supreme and uncontrollable, notwithstanding any prohibitions or limitations contained in the constitution. The judicial power is thus made the guardian of the constitution. And it is here important to observe that the eminent writers of the Federalist have shown that the judicial power is that which is least dangerous in a constitutional point of view. The great difficulty in public law is to restrain usurpations and encroachments of the legislative power, especially in a democracy; and the difficulty next in magnitude is to keep within bounds the executive power. The judicial power therefore is the safest guardian of the fundamental laws of the state and the liberties of the citizen; and that constitution will be most secure, and most free from arbitrary power, wherein this principle is best understood and acted upon,—provided the independence and dignity of the judges be sufficiently established on a firm foundation.

One important error of the constitutions of the Continent is, that (on the example of France) they are framed with a jealousy of the judicial power. Thus what is called the administrative branch of the government is made subordinate only to the administrative power, instead of being (as with us, by means of civil actions and indictments against public officers, and by the prerogative writs of *mandamus* and *quo warranto,*) amenable to the Courts of Law. The door is thus opened to arbitrary power; and the people are not taught to look to the law as the great and universal remedy for wrong, and the judges as the exponents of that remedy. To this fatal error may partly be attributed the insecurity of the public peace, and the government itself, in some foreign countries. Where we should bring an action or move the Court of Queen's Bench, the people of those countries plot a conspiracy, or make an insurrection. On these principles, we may safely say that the federal government of the United States could not long exist without the extraordinary jurisdiction which we are now examining: a jurisdiction requisite for the determination of questions which the nature of their federal polity must necessarily engender.

[a] Montesquieu, Espr. des L. ix., c. vi.

The necessity for that jurisdiction specifically arises from this. Their constitution is what the Federalist (No. 78) designates as limited—that is to say, one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice by no other way than through the medium of the courts of justice, whose duty it must be to declare void all acts contrary to the manifest tenor of the constitution.

This does not imply a superiority of the judicial over the legislative power, though, as a general proposition, the authority which can declare the acts of another void is superior to the one whose authority may be declared void by the former. The theory of the law on this subject deserves some examination.

The act of a delegated authority, contrary to the commission or beyond the commission under which it is exercised, is void. *Diligenter fines mandati custodiendi sunt; nam qui excedit, aliud quid facere videtur.* He who acts beyond his commission acts without any authority from it. Now the judicial power can declare void the acts of the legislative power where those acts are beyond the delegated power of the legislature, and therefore not legislative acts except in form only. Thus the judicial power is not placed above the legislative power, because the former must obey the valid acts of the latter.

These constitutional questions are cases of conflict between a fundamental law and an ordinary act of the legislature, in which the judges must be governed by the fundamental law. They are analogous to those cases where two statutes exist at one time, clashing wholly or in part with each other, and neither of them containing any repealing clause. In such a case, it is the province of the Courts to liquidate and fix their meaning and operation: so far as they can by any fair construction be reconciled to each other, reason and law require that this should be done: but where this is impracticable, it becomes matter of necessity to give effect to one in exclusion of the other. One rule of law is, that the last in the order of time must be preferred to the first. If two laws conflict with each other, the Courts must decide upon the conflict. So, if a law be in opposition to the written constitution, the Court must determine in obedience to the latter, which is the supreme and fundamental law.[a] Thus the ordinary statutes of the United States are *lex sub graviori lege.*

This theory has an important application to our law respecting by-laws (which is probably derived from the Pandects):[b] for if a by-law

[a] *Marbury* v. *Madison*, 1 Cranch, 137 (Supreme Court).

[b] Voet. Comm. ad Pand., lib. 1., tit. ix.

be contrary to the general laws of the kingdom, it is void; because all by-laws, says Hobart (his Rep. 210), must ever be subject to the general law of the realm, and subordinate to it. And so it is with the laws and ordinances made by the Commissioners of Sewers, under the stat. 23 Hen. VIII. c. 5, which may be questioned and set aside, on *certiorari*, by the Court of King's Bench, as it is shown in the 4th Reading of Callis on that statute. And the canons made in convocation are void if they be against the laws of the land, as appears in *Caudray's case*, 5 Rep. All these are *Lex sub graviori lege.* They are binding on the Courts of Law so far as they are valid, and the Courts have power to decide whether they be valid or no.

And so the ordinances of Assembly made in the possessions of the Imperial Crown in America are subject, by stat. 3 & 4 Will. IV. c. 59, s. 56, and 8 & 9 Vict. c. 93, to this provision, that they shall be null and void if they are in anywise repugnant to the statutes of the United Kingdom, so far as such statutes relate to such possessions. Thus stat. 9 & 10 Vict. c. 94, was necessary to enable the legislatures of certain of those colonies to repeal certain duties imposed on them by Act of Parliament. And, on the same principle, the stat. 10 & 11 Vict. c. 71, was passed to enable her Majesty to give her assent to a bill of the Legislative Counsel and Assembly of Canada which was repugnant to certain Acts of Parliament.

The power which the Crown has of disallowing acts passed by colonial legislatures, after they have received the assent of the governor, and of refusing its assent when they have not received that of the representative of the Crown in the colony, practically fulfils the purposes of the extraordinary jurisdiction of the American Supreme Court. It has lately been proposed to distinguish by legislative enactments between colonial and imperial matters, entrusting the former only to the colonial legislatures, and to erect a court for the determination of the validity of Colonial Laws. But the difficulty of defining that distinction has not yet been overcome. And those who appeal to the example of the United States of America, as an authority for the legal principle of the proposed legislative limitation of powers, do not sufficiently consider that the constitution of that Republic is a written instrument of limited and enumerated powers, and therefore most materially different from the British Constitution with reference to the solution of this important problem of public law.

We must receive with considerable qualifications what Lord Coke said, in *Dr. Bonham's case* (8 Rep. 118), in which he declared that the Common Law doth control Acts of Parliament, and adjudges them void when against common right and reason. And Lord Chief Justice Holt, in *The City of London* v. *Wood* (12 Mod. 687), adopted this

dictum of Lord Coke, which is supported by Lord Chief Justice Hobart, in *Day* v. *Savage* (Hob. Rep. 87), who insisted that an Act of Parliament made against natural equity, so as to make a man a judge in his own cause, was void. These authorities require some comment.

Every independent state must, as Grotius shows[a], have somewhere a *sovereign power*—that is to say, a power the acts of which are independent of every other superior power, so that they can be annulled by no other human will. In the United States of America this sovereign power is vested in the national government, in the state governments, and in the people, who hold the residuary sovereignty not delegated by the constitution. But our constitution vests the whole of this supreme sovereign power in the Parliament, which is therefore said to be omnipotent.

Nevertheless there are things which the Parliament cannot do. Thus (as Lord Coke lays it down in 4 Inst. 42) the Parliament cannot by any act restrain the power of a subsequent Parliament, nor make a statute which a subsequent Parliament cannot alter. And Acts of Parliament which are impossible to be performed are of no validity, for *impossibilium nulla obligatio est*. And, on the same principle of impossibility, no man can be held bound by the obligation of a law which is contrary to morality or religion. Papinian finely expresses this position: *Quæ facta verecundiam, officium pietatem nostram lædunt, et generaliter contra bonos mores sunt, nec facere nos posse dicendum est.*[b]

But the doctrine of the law, with regard to the supreme power of Parliament, is established as thus laid down by Blackstone:—"Lastly, Acts of Parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are with regard to those collateral consequences void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that Acts of Parliament contrary to reason are void. But if Parliament will positively enact a thing to be done which is unreasonable, I know no power in the ordinary forms of the constitution that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by Parlia-

[a] D. de la G., l. i., c. iii., § 7.

[b] L. xv., ff. De Condit. Institut.

ment; and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it."[a] And our illustrious commentator goes on to say, that if Parliament were to enact that a man shall be judge in his own cause, no Court could defeat that enactment. It is proper to observe here, that the important rule that no man shall be judge in his own cause, or a cause in which he has an interest, was confirmed, with some qualification, in the late case of *The Grand Junction Canal Company* v. *Dimes*[b], by Lord Langdale, who held that the rule, though it ought not to be departed from without necessity, must give way to circumstances and to the necessity of avoiding a denial of justice.

We have now considered the general principle regarding the limits of the judicial power in the interpretation of written law. The unwritten law next requires examination.

With regard to one sort of unwritten law, namely particular customs or laws which affect only the inhabitants of particular districts, the Courts of Law have a remarkable power, that of adjudging them bad or void if they be unreasonable. And, in Co. Litt. 62. a., it is laid down that the reasonableness of customs is not always to be understood of every unlearned man's reason, but of artificial and legal reason warranted by authority of law. The doctrine that customs must be reasonable is also to be found in Co. Litt. 59. b., 141. a. This doctrine is probably derived from a constitution of the Emperor Constantine, in Justinian's Code (L. ii., cod. Quæ sit longa Consuetudo) explained by a Decretal, in which Pope Gregory IX. declares that positive law cannot be changed by custom any more than natural law, unless such custom be reasonable (*rationabilis*) as well as grounded on long continuance. This Decretal is to be found among the Decretals in the Corp. Jur. canon x., lib. i., tit. iv., cap. xi. We come now to the Common Law, or general Customary Law of the realm.

In Co. Litt. 11. a., twenty different sources are enumerated from whence the Common Law is derived or may be proved; but Blackstone sums up the whole by saying that the principal and most authoritative evidence of the Common Law is to be found in the decisions of the judges, who are the depositaries and the living oracles of the law, and are bound by an oath to decide according to law. The unwritten law, in some parts of the Continent, was proved in disputed cases by witnesses, or *per turbas*,—by crowds of witnesses, (as we learn from Canciani, Leges Barbarorum; Giannone, History of Naples; and Dupin's History of the French Law),—until this inconvenient mode of trial was put an end to by the compilation of bodies of law called *Statuta*

[a] 1 Bla. Com. Introd. p. 90.
[b] 12 Beav. 69.

or *Coutumes*.[a] But, in England, the Common Law was always held to be in the breast of the judges, and therefore it does not require to be proved otherwise than by authorities, of which the chief are the decisions of the Courts. And there is a Common Law or general Customary Law recognised by the modern Civil Law, which requires no other than scientific proof—as Savigny shows.[b] Those decisions are binding in our law upon the judges, because they are evidence of what the Common Law is, and precedents and rules are to be adhered to unless clearly erroneous or absurd. And the Courts sometimes overrule adjudged cases where they appear on examination to have been erroneously decided. New cases occur to which there is no exact parallel in the books, and they are decided on principles of Law. Thus, Lord Mansfield, in a case of this kind, (*Jones* v. *Randall*, reported in Cowp. 39,) said that the Law of England would be a strange science if it were decided on precedents only. "Precedents," said the noble and learned judge, "serve to illustrate principles and give them a fixed certainty. But the Law of England, which is exclusive of positive law enacted by statute, depends upon principles; and these principles run through all the cases, according as the particular circumstances of each have been found to fall within one or other of them." And, in the case of *Mirehouse* v. *Rennell*, 8 Bing. 515, Mr. Justice Park said, in the House of Lords, "The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any Court; nor is there to be found any opinion upon them of any of our judges, or of those ancient text writers to whom we look up as authorities. The case therefore is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all: and, because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our Common-Law system consists in applying to new combinations of circumstances, those rules of law which we derive from legal principles and judicial precedents; and, for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases that arise; and we are not at liberty to reject them, and to abandon all analogy to them in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we

[a] Canciani Leges Barbar., tom. v., p. 13; Giannone, Storia Civile di Napoli, l. xxi., cap. ult.; Dupin, Hist. du Droit Franc. And see an instance of an inquiry *per testes* into a custom in Justinian's Novell, 106; and Savigny, Tr. de Droit Rom., vol. i., pp. 179, 180. Paris, 1840.

[b] Savigny, Tr. de Droit Rom., vol. i., pp. 187, 188. Paris, 1840.

ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of the Law as a science."

The process alluded to by Lord Mansfield is that learnedly explained by Savigny, under the denomination of the determination of Law by *Analogy*. It consists in the settlement of new relations of law and new emergent questions in a manner in harmony with existing law, that is to say, in conformity with the principles and nature of that portion of the judicial institutions to which they appertain. And here the correct appreciation of the reasons of law is of great importance. Thus analogy is the instrument of the progress and development of the Law.[a] And so Julian says, in the Pandects, (L. xii., De. Leg.) *Is qui jurisdictioni præest ad similia procedere et ita jus dicere debet.*

The effect of these doctrines is, that a process is constantly going on whereby the law is rendered more and more settled, and the power of the Judges is progressively narrowed. And these observations apply as well to the Courts of Equity as to the Courts of Common Law; for though Spelman, Coke, and even Bacon, give their sanction to the doctrine of the arbitrary nature of Equity, and Selden said that Equity is a roguish thing for which we have no measure,—this was only in the infancy of our Courts of Equity; and, as Lord Redesdale said, in *Bond* v. *Hopkins*, 1 Scholes & Lefroy, 429, "There are certain principles on which Courts of Equity act which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of Equity have in this respect no more discretionary power than Courts of Law. They decide new cases as they arise, by the principles on which former cases have been decided; and may thus illustrate or enlarge the operation of those principles. But the principles are as fixed and certain as those on which the Courts of Common Law proceed."

I have shown, in a former Reading, that the Civil Law being contained in a written *corpus juris*, for that reason allows less authority to decisions than the Common Law, of which the Courts are the oracles and their decisions the evidence. The general doctrine of the Civil Law is, that though, as Ulpian says (L. ii., ff. De Constit. Princip.), what has been settled as law ought not, without evident utility, to be departed from, and Callistratus lays it down that (L. xxxviii., ff. De Legib.) a constant and concordant series of decisions has force of law,—yet the rule of Justinian holds good (L. xiii., cod. De Sentent. et Interloc.) that *Legibus, non exemplis judicare oportet.*

[a] Savigny, Tr. de Droit Rom., vol. i., pp. 283, 284. Paris, 1840.

We have seen that our jurisprudence does not allow the judge to supply a *casus omissus* in an Act of Parliament, nor to extend its operation beyond the meaning of the words. This leads us to the examination of a very curious article in the French Civil Code, which provides, that any judge who refuses to decide a case under pretext of the silence, the obscurity, or the insufficiency of the law, may be prosecuted for denial of justice.[a] This remarkable law (which applies to civil and not to criminal cases) was intended to prevent references to the legislature in cases not provided for by the code, and it throws upon the judges the duty of deciding such cases by equity or analogy, according to the maxim *Boni judicis est ampliare jurisdictionem.*

The framers of the French code adopted this method of preventing the defect or delay of justice; because they felt, with Julian,[b] that no laws can be so drawn as to comprehend every case that may arise; and therefore thought that a body of jurisprudence ought to form gradually, by decisions, by the side of the written laws, to supply its deficiencies. And there are texts in the Roman Law which support this view; particularly the celebrated one of Papinian:—*Quod legibus omissum est, non omittitur religione judicantium.*[c]

Savigny argues that this provision of the French Law is grounded on the very nature of judicial functions.[d]

In our own legal history there is something analogous in principle to this. I mean the Statute of Westminster II., 13 Edw. I. c. 24, which required the Clerks in Chancery to frame new writs in cases where there was no precedent of a writ, that justice might not be deficient. And Blackstone, citing the opinion of Justice Fairfax from the Year Book, 21 Edw. IV., says, that that provision might have answered all the purposes of a Court of Equity, except that of obtaining a discovery by the oath of the defendant. On this Statute were framed actions of trespass on the case analogous to the action, *Præscriptis verbis in factum* in the Roman Law. And we find in the title of the Pandects, regarding these actions, a law very similar to the English Statute.[e]

Dupin, in his edition of Burlamaqui, makes valuable observations on the spirit of the laws in different countries regarding the extent of the judicial power. He states,[f] that in England and in Italy the judge is more strictly subject to the letter of the law than elsewhere: and that when Francis I. united Savoy to France, the judges, whom he

[a] Code Civ., tit. Prélim., art. iv.
[b] L. x., ff. De Legib.
[c] L. xiii., ff. De Testib.
[d] Savigny, Traité du Droit Rom., vol. i., p. 203. Paris, 1840.
[e] L. xiii., ff. De Præscriptis Verbis.
[f] Burlamac. Dr. des Gens, t. iii. pp. 483, 484.

appointed in the new province, departed from the terms of the Laws; and the people of Savoy petitioned the King that the judges might be forbidden to *decide according to equity*. The learned writer observes that the expression used by the petitioners was incorrect, though their prayer may have been just.

It must be admitted, he continues, that the name of equity may be made a pretext for arbitrary power, and that the difficulty of distinguishing the one from the other is the reason why, in some places, Courts are tied down to the letter of the law. But arbitrary interpretation is not equity. The judge must not be permitted to decide contrary to the terms of the law. But the body of the Laws contains a general system of equity, and the judge must seek in that system the reasons of his determination on the sense of the law, and not on the mere words.

If, however, he cannot give an equitable judgment without contradicting the text of the Law, he must either submit, or refer the matter to the legislative power, that a remedy may be provided. Such are the general principles of the French jurisprudence, regarding the interpretation of Civil Laws. But, as Portalis shows (in the discussion on the Articles of the Code above referred to), in criminal cases the powers of the judge must be more confined, for he can only convict where the law has made the specific act done by the prisoner an offence. And Beccaria (§ iv.) lays it down that the criminal judge must make a single perfect syllogism, the major premise being the law; the minor the act charged against the prisoner; and the conclusion, his sentence of acquittal and condemnation; from whence the learned author argues that the terms of the Law must be strictly adhered to.

The Roman Prætors had great powers to supply the deficiencies and mitigate the rigour of the Civil Law. Those powers were afterwards exercised by the Roman Emperors, on the principle, that *ejus est interpretari cujus est condere*, which is laid down in the 143rd Novell Constitution of Justinian. Thus the Emperor Constantine declares (L. i. cod. De Leg.), that to the Crown belongs the cognizance of the interpretation interposed between the Law and Equity. And so it was in the old French Law, as appears from Domat.[a] But a Constitution of the Emperors Honorius and Theodosius, dated A. D. 421, shows that by the Civil Law, the Roman Emperor did not claim the interpreta-

[a] Domat, L. Civ. Liv. Prélim., tit. i., sect. ii., § 12. As to the Interpret. of Ecclesiastical Canons, see lib. vi., cod. De Sacros Eccles. Savigny, Tr. de Droit Rom., tom. i., chap. iv., § 48, (Paris, 1840,) argues that Justinian intended to restrain the judges from all but the mere mechanical application of the Law, on the same principle that the Emperor forbade all Commentaries on his Laws. See what Savigny says respecting the Prætors, at p. 115.

tion of the canons, which was left exclusively to the synods of the Church.

From this Imperial interpretation came the *Rescripta* of the Roman Law, which are answers given by the Emperor to judges, public officers, or private persons, by whom the supreme power was invoked where the ordinary Law was insufficient or otherwise defective.

The legislation by Rescript is severely condemned in the preliminary discourse to the French Code, and is undoubtedly obnoxious to the observations of Montesquieu, respecting the danger of mingling the judicial with the legislative power. And it is safest, in general, to frame explanatory laws so as not to affect cases already in dispute.

By the Civil Law, whatever is judicially decided by the Emperor has force of Law as a precedent in all similar cases.[a] And the Rescripta contained in the *Corpus Juris* have force as general Laws.[b] But, in the Canon Law, a Rescript is in general binding only between the parties whose dispute it is intended to decide, unless it be given by way of general ruling, interpretation, or declaration of Law.[c]

[a] L. xii., cod. De Legib. [b] Reiffenstuel, L. i., tit. iii., De Rescript. § 12.
[c] *Ubi supra*, § 13, &c.

EIGHTH READING.

(*Trinity Term*, 1850.)

ON THE CRIMINAL JURISPRUDENCE OF THE CIVILIANS.

A DOUBT may possibly be raised whether the Criminal Jurisprudence of the Civilians be a subject worthy our attention in this age and country. I may be asked,—Is not the Criminal Law of England the best in the world, and do we need any information respecting other systems of Criminal Law?

It may indeed safely be asserted, that the Criminal Law of England, as at present administered, is that of all others which has best reconciled the protection of society with humanity, and the safety of innocent persons, who may through error or malice be accused of crimes. But the Roman Law has things which might be imitated with benefit by the legislature of this country, especially regarding the definition and distinction of criminal offences. And it would be strange if there were nothing worthy even of cursory examination in a system which is the basis of the Criminal Laws of Scotland,[a] and of almost every country on the Continent of Europe. We shall find in the course of this investigation much to illustrate our own laws, and to enlarge our views. The comparison of our own with other systems, the deduction of scientific principles, the analysis of theories and doctrines, and the discussion of the law on a broad and comprehensive basis, are objects which, in these Readings, it has been my constant desire to attain. And in furtherance of this plan, as well as to redeem my promise by bringing before my hearers information not within the reach of many, I will now proceed to explain such parts of the Roman Criminal Law as seem most likely to serve our purpose.

The works of the older civilians give us cause to feel proud of the comparative mildness of our criminal code. But we must not allow our patriotism to drive from our memory that the boasted humanity of our law is but of recent date. What says Lord Coke of the law of his time?—"What a lamentable case it is to see so many Christian men and women strangled on the cursed tree of the gallows; inasmuch as if in a large field a man might see all

[a] See *R.* v. *Livingston*, Maclaren's Arguments.

the Christians that but in one year throughout England come to that untimely and ignominious death, if there were any spark of grace or charity in him it would make his heart to bleed for pity and compassion."[a] Long after this was written, and but a few years from our time, the law of England was the most sanguinary in Europe.

Within our recollection no prisoner indicted for felony was allowed his defence by counsel except on a point of law, though Blackstone speaks of this as a rule not at all of a piece with the rest of the humane treatment of prisoners by the English law; for (as that great writer argues) upon what face of reason can that assistance be denied to save the life of a man which yet is allowed him in prosecutions for every petty trespass? And, until lately, execution followed judgment of death with such frightful haste that there was little time for an appeal to the royal mercy. "The dreadful rapidity," says a learned barrister of this house, writing in the year 1834, "with which execution follows the sentence, seems in the punishment of some crimes to invest the law rather with the attributes of revenge than with those of justice. We feel such an abhorrence of the murderer, that no interval appears too short between his conviction and death. But who can remember without a shudder that this impatience of delay, this almost passionate precipitation, has consigned those to death amid the execrations of a mistaken populace whom the lapse of a few hours would have proved innocent? Such cases are generally hushed up, and too soon forgotten. Few perhaps now remember the fate of the poor girl who was hanged for poisoning a family in Chancery Lane, but whose innocence was shown almost before her corpse was cold; or, again, of the two men who suffered for the murder of Mr. Steele, as their attorney afterwards proved, unjustly."[b]

Such was the practice a few years ago, and yet the danger of precipitate executions had been pointed out even in ancient times; for St. Ambrose enjoined the Emperor Theodosius to command a respite of thirty days before execution of all sentences of death, or even forfeiture of estates.[c] And this principle has of late years been adopted in this country in capital cases.

But, even now, there is no right of appeal in such cases by the English Law, which is in this respect inferior to the Civil Law; for, as the great civilian Carpezovius says, the salutary remedy of appeal is more especially to be allowed where the question in dispute involves, not a mere civil and perhaps trifling right, but the life of a man and

[a] Co. 3rd Inst. Epilogue.

[b] Criminal Trials in England, by Geo. Wingrove Cooke, B.A., 1834.

[c] Butler's Lives of the Saints, vol. ii., p. 1006.

an irreparable wrong.[a] Yet this remedy, which is of right by the laws of England in mere matters of property, is only permitted *ex gratiâ* after judgment of death. And, where a writ of error is granted, the prisoner may legally be executed pending the writ, so that the reversal of the sentence will, as Blackstone observes, be only some consolation to his family. It is singular that, though by stat. 8 & 9 Vict. c. 69, execution on judgments for misdemeanors is suspended by writ of error, the law remains unaltered as to felony.

It is indeed strange that legislators seem to hold property more valuable than human life! And thus Blackstone remarks, that it may certainly afford matter for speculation, that in civil causes there should be such a variety of writs of execution to recover a trifling debt, issued in the King's name, and under the seal of the Court, without which the sheriff cannot legally stir one step; and yet that the execution of a man, the most important and terrible task of any, should depend on a marginal note made by the judge on the calendar. And men are transported and imprisoned without even the formality of a marginal note! Strictly speaking, the record ought in criminal cases to be made up, and the judgment regularly entered thereon, like the *postea* in a civil case; but in practice this is never done, except where a writ of error or *certiorari* is sued out, because the delay and expense would be too great, owing to the length of the instrument, which must set out all the proceedings in a formal manner. It deserves consideration, however, whether it would not be desirable to require the judgment in every case to be entered on the back of the indictment, and signed by the judge, or some officer of the Court. This would at least be more decently formal, and would prevent the danger of error.

In one respect, the Common Law of England has the advantage of the Civil Law, for the former never admitted torture as a mode of discovering evidence of crimes,—though it was allowed by the Laws of Scotland, and only abolished by stat 7 Anne, c. 20.[b]

One curious feature in the history of this dreadful mode of procedure is, that among the ancients it was only used against slaves, though it is difficult to see on what principle it was so restricted, assuming it to be a good mode of ascertaining truth. But under the Roman Emperors it was extended to free citizens, and it might naturally be supposed that this would lead to its abolition. Yet this was not so, and the long continuance of so absurd an institution is a curious point in the history of legislation.

Ulpian speaks of torture as *res fragilis et quæ veritatem fallat*,

[a] Carpezov. Pract. Rer. Crim., pars iii., quæst. cxxxix., num. 7.

[b] Maclaren's Arguments, Introd., § 9.

and he observes that many have so much strength and fortitude that the truth cannot be extorted from them by pain, while others will rather tell any falsehood than suffer.[a] And Cicero thus condemns torture in his oration, *Pro Sylla:* "*Illa tormenta gubernat dolor, moderatur natura cuiusque tum animi, tum corporis; regit quæstor, flectit libido, corrumpit spes, informat metus, ut in tot rerum angustiis nihil veritati loci relinquatur.*"

But the most remarkable condemnation of torture is to be found in the celebrated treatise of St. Augustine, *De Civitate Dei;* where he briefly expresses, with great force and beauty of language, all the arguments urged by Beccaria and Filangeri thirteen centuries afterwards. *Cum quæritur utrum sit nocens, cruciatur; et innocens luit pro incerto scelere certissimas pœnas.* "While it is inquired whether he be criminal, he is tortured; and the innocent man suffers for a doubtful offence most certain punishment. Not because it is discovered that he has offended, but because whether he be an offender is unknown. And thus the ignorance of the judge is the misfortune of the innocent. And (which is most intolerable, and to be lamented with floods of tears,) while the judge tortures the accused that he may not unknowingly kill the innocent,—his ignorance produces this dreadful effect:—he tortures and then puts to death a guiltless man, whom he has tortured that he might not condemn the innocent. For if, according to the wisdom of these men, the prisoner prefers to escape from this life rather than sustain the torments longer, he confesses a crime which he never committed. And after his condemnation and execution the judge is still ignorant whether he has destroyed a criminal or an innocent man."[b] And then this great Father of the Church, after some further arguments, proceeds, with his usual profound thought and wisdom, to make reflections on the strange spectacle of a just judge sitting, compelled by human society, usage, and established institutions, to perpetrate these abominable cruelties, and not feeling that he does wrong.

Notwithstanding this eloquent and unanswerable opinion of St. Augustine, trial by torture crept from the secular into the Ecclesiastical Courts in some countries, and is even sanctioned by three passages in the Decree of Gratian. But Van Espen condemns the practice, and urges with abundant reason that the jurists who defend torture, themselves admit its absurdity by holding that evidence given under the question deserves little or no attention, unless it be repeated and persisted in after an interval of time without

[a] L. i., § 23, ff. De Quæst.

[b] Div. August. De Civ. Dei, lib. xix., cap. vi.

torture.[a] Yet it continued to be law in some countries until within a century of the present time.

We must not, however, fall into the error of those who reject the Civil Law altogether because it admitted trial by torture; and we shall find ourselves repaid by the examination of some portions of the criminal jurisprudence of the civilians. And we will first consider the law of theft, which is peculiarly important, because larceny is of all criminal offences that which most occupies the time of the judges in all countries.

Justinian and the jurisconsult Paulus define theft to be the fraudulent taking either of a thing or of its use or possession *lucri causâ*, for the purpose of gain or advantage,—contrary to Natural Law. *Furtum est contrectatio rei fraudulosa lucri faciendi gratiâ, vel ipsius rei vel etiam usus ejus possessionisve quod Lege Naturali prohibitum est.*[b]

And, first, theft is evidently contrary to Natural Law, because it is a violation of the Law of property, which is part of the secondary Natural Law; and so Ulpian (L. xlii., ff. De Verb. Signif.) includes theft among the offences which are naturally wrong.

Secondly, *contrectatio*, or taking, is necessary to constitute theft. It rests on the authority of several texts in the Pandects, that to constitute theft there must be some overt act of appropriation or detention of the thing, which is described by the word *contrectatio.*[c] As Ulpian says, *Cogitationis pœnam nemo patitur*,—there must be some overt act sufficiently showing the intent of depriving the person having the legal possession, or the owner, of his property. This is the principle of our English Law, which requires an asportation to complete the offence of larceny, though the operation of the rule in the Civil Law is more extensive.

Whether the offender removes the thing and takes possession of it, or whether by fraud he obtains possession of it, he is equally guilty of theft. So Scævola says, *Furtum fit cum quis indebitos nummos sciens accipit*,—he commits theft who knowingly receives money not due to him.[d] The reason is that in such a case there is *contrectatio fraudulosa*, and the false practice is only the means whereby the property is stolen. Thus it appears that in the Civil Law there is no distinction between larceny and obtaining goods by false pretences,—an unnecessary distinction, which occasions a great deal of difficulty in our Law. It is true, that where goods are obtained by false pretences the owner apparently consents to part with his property. But that consent is given

[a] Van Espen, Jus Eccles. Univers., pars iii., tit. viii., cap. iii.

[b] Inst. L. iv., tit. i., § 1; L. i., § 3, ff. De Furtis.

[c] L. iii., § 18, ff. De Adquir. et Amit. Possess.; L. xv., ff. Ad Exhibendum.

[d] L. xviii., ff. De Condict. Furtiva.

through fraud and error, and *non videtur qui errat consentire.* The consent is therefore absolutely null, and cannot be pleaded by him who fraudulently availed himself of it. There is consequently no sound legal ground for the distinction between theft and false pretences. You will find this position supported by the ring-dropping case, *R.* v. *Patch*, 1 Leach, 238, and other cases in Archbold, Plead. 202, 203, 204; all of which were held to be larceny, though it is difficult to distinguish them from cases of obtaining goods under false pretences.

Where the property is fraudulently detained or embezzled, and thus prevented from passing or returning into the possession of the owner, or of any other person having a legal right to it, that detention is *contrectatio,* for this is the same on principle as actually taking it from some one; and it is sufficient, so far as regards *taking,* to constitute the crime of theft.[a]

Thus, hiding a thing with intent to keep or appropriate it, to the injury of the legal owner or possessor, is *contrectatio.*[b] And this is so even when the possession of the goods was obtained *bonâ fide,* without any fraudulent intent in the first instance. The English Law is otherwise on this point. But the Civil Law is more simple, and grounded on good reason,—for there seems to be no sound argument to show that the offence ought to depend on the intent of the original taking. If a man borrow a horse and sell him,—it is difficult to show on any but technical principles why it should be necessary to prove that he intended to sell him at the time of the borrowing, to sustain an indictment for larceny. The intent to steal at the time of selling the horse is the real gist of the case, for that is the wrongful act upon which the charge rests.

By the Civil Law only moveable property is capable of being the subject of theft.[c] The reason of this is, that immoveables cannot be taken or withdrawn from the pursuit of their owner, which is of the essence of the crime of theft. The wrongful taking of immoveables without a colourable title is an offence of a different nature, namely, a breach of the peace, and remedied by the Civil Law by means of the interdict *unde vi.*[d] And the wrongful taking possession of immoveables under a claim of title is remedied by the interdict *uti possidetis.*[e] It may also involve a breach of the peace.

But this rule, that immoveables are not capable of being the subject

[a] L. vi., cod. De Furt.
[b] L. i., § 2, ff. De Furt.
[c] Instit. tit. De Usucap., § 2.
[d] L. iii., § 8, ff. De Vi et Vi Armata.
[e] See the tit. of the Pand. De Adquir. et Amitt. Possess, lib. vi., &c.; and see Ersk. Instit., book iv., tit. iv., § 58.

of theft, must be construed strictly, having regard to the reason of that rule, which is that only moveables can be removed or withdrawn from the pursuit or claim of the owner. Thus all things which, though accessories or parts of immoveable or real property, may be detached or moved from it, are subjects of theft; such as trees and other vegetables, stones, sand, clay, and such like, which are all capable of asportation.[a]

By this sound practical doctrine, the Civil Law avoids all the subtile and technical rules which our law has resorted to for the purpose of determining what and when things savour of the realty (such as title-deeds), or are parcel of the realty.[b] These rules are useless and inconvenient, and they show that inconvenience must arise from neglecting *the reason* of a principle of law, whereby that principle is applied in an arbitrary manner, and gives rise to artificial and arbitrary distinctions.[c]

The Civil Law holds with the English Law, that theft can be committed only of such things as are of some intrinsic value. The commissioners on the Criminal Law remark, that if the principle of this rule were regarded, and its early applications were superseded, most of the existing anomalies of the Common Law with regard to the subjects of theft would disappear, and many statutory provisions would be rendered unnecessary. They further observe, with abundant reason, that the principle of the Common Law is that things of value should be deemed the subjects of theft, and that if this principle of the Common Law had been applied, for the first time within the last century, it would necessarily have been held to comprise a variety of things which have been subjects of special legislation in modern times, because they were not deemed to be of value in a remote age.[d]

The Civil Law is in accordance with this opinion of the commissioners. It rules that if a thing be of such value as to be barely capable of estimation, it may be the subject of theft; and so it is laid down by Boehmerus, Cremani, Mathæus, and other great authorities. The reason of this rule is, that the laws of property cannot be said to be injured by the taking of a thing which is of no value at all, and the taker could not have conceived himself to be doing wrong. But on the other hand, the value of things varies greatly at different times, and therefore whether the stolen goods be of any value or none must be determined in each individual case; and it is a question peculiarly

[a] L. xxv.; L. lvii., ff. De Furtis.

[b] 1st Rep. of Commiss. on the Crim. Law, 1834; Digest of the Law of Theft, § 1.

[c] L. i., ff. De Reg. Jur.

[d] 1st Rep. on Crim. Law, p. 13; see Bynkershoek, Op. tom. i.; Observat. Jur., lib. i., cap. iii., De Furto Rei Minimæ.

fitted to be left to a jury. Thus some substances which are at one time valueless may, by a discovery of a new use to which they are applicable, become valuable. So a gallon of water would be of no value under ordinary circumstances, or if taken from a river or large reservoir; but in a time of drought it may be as valuable as wine usually is.

Here again the perplexity of the Common Law gives us another instance of the evil arising from the misuse of rules; I mean the neglect of the reason on which they are grounded—whereby, instead of meeting and adapting themselves to the various cases which from time to time arise, they lead to absurdity and confusion.

Thus the crude notions of an early age respecting property caused the introduction of the Common-Law rule, that securities concerning choses in action are not subjects of theft—an absurdity remedied by stat. 7 & 8 Geo. IV. c. 29. The ancient law took no notice of such instruments as notes and bills, and considered them as mere evidence and of no intrinsic value. But, being now of value, they are within the principle of the rule of the Civil Law. So stealing a dog is not larceny at Common Law, because a dog, not being fit for food, was held by the lawyers of ancient times to be of no value. Yet this test is absurd in our times. And many other animals are valuable, though unfit for food, by reason of their rarity or other qualities, which give them value in our present state of civilization. Thus it is absurd to say, that to steal a fowl worth a few shillings is larceny, and that to take a rare bird of great price is not larceny.

We come now to the second part of the definition of theft, which is included in the word *fraudulosa*. *Furtum est contrectatio rei fraudulosa.*

The taking must be fraudulent, for if it be forcible, the offence is not theft, but robbery, which is a different offence; and the word fraudulent also implies the act to be wrongful. Fraud is the same thing as *dolum malum*, which is defined by Labeo to be *omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam.* It is every cunning, or falsehood, or contrivance used to circumvent, to cheat, or to deceive another. Thus if a man go into a shop and run off with some of the goods in the presence of the owner, this is a contrivance, by quickness and speed of foot, to circumvent and cheat him, though there is no actual falsehood in the case.

This portion of the law depends upon the rule given by Justinian, *Furtûm sine affectu furandi non committitur.* And Paulus lays it down that the *malefica voluntas,*[a] which in our law is called the felonious intent, is necessary to constitute the offence. Thus Vinnius

[a] L. liii., ff. De Furtis; Vinn. ad Inst., lib. iv., tit. i.

shows several cases where the offence is not committed, because the party had not the intent to steal.

Thus persons incapable of responsibility, such as lunatics and infants below the age of reason, cannot have the fraudulent intent necessary to render them amenable to the law regarding larceny. This principle depends on the doctrine of general jurisprudence, admirably explained by Lampredi, in the first volume of his Universal Public Law, that when a man has knowledge of the rule which he is bound to follow, and free will to choose whether he shall or shall not do a given act, he is morally the cause of his own act. This attribute or quality of human actions is, in the language of the science of general jurisprudence, called *imputability*. And the judgment formed whereby—given the author of an act,—it is determined whether the effect of that act is to be imputed to him, and whether, according to the rule of action or law, he deserves praise, or blame, or punishment,—this is called the *imputation* of actions.

The former regards the agent, and the action in the abstract; while the latter compares the action with the law, and attributes to the agent the good or bad effects of the action.

Thus assuming the action to be *imputable;* its actual *imputation* supposes, first, that the law commands or forbids the action itself: secondly, that the agent is bound by some legal obligation to do or not to do it: and thirdly, that there is a connection between the physical act of the person and the effect, which is contrary to law, of which connection he was aware.

If the thing in question be not forbidden or commanded by law, it is not legally imputed. So Gajus says, that no man commits a legal wrong by exercising his right: *nullus videtur dolo facere qui suo jure utitur*. This rule is exemplified in *Hammond* v. *Hall*, 10 Sim. 551, and in the notes to the case of *Ashby* v. *White*, 1 Smith, Lead. Cas. 130. So Ulpian decides, that if a man open a well in his house whereby a well in a neighbour's house is dried, the law gives no remedy.[a] It is *damnum absque injuriâ*. Ulpian says, *Injuria est quod non jure factum est, hoc est contra jus*. And he lays it down that no man is guilty of a (legal) wrong, unless he do something which he has no legal right to do.[b]

With these rules the celebrated definition of liberty by Florentinus agrees. *Liberty is the natural faculty of doing whatever a man pleases to do, except those things which are forbidden by law or by physical power.*[c]

[a] L. xxiv., in fin. ff. Damni infecti.
[b] L. v., § 1, ff. Ad Leg. Aquit.; L. cli., ff. De Reg. J
[c] L. iv., ff. De Statu Hom.

There are actions forbidden by natural law, and not forbidden by municipal law, and the contrary. Paulus says, *Non omne quod licet honestum est;* and Ulpian also draws a distinction between that which is lawful—*quod licet*, and that which is agreeable to moral law—*quod honestum est.*[a] A wrong must be a violation of a law. When that law is a natural law, the wrong is naturally an offence or delictum: and where the law violated is a municipal and purely voluntary law, the wrong is a civil crime or wrong. And the law violated may partake of both characters.

Such are the principles of jurisprudence regarding the first condition of the imputation of actions.

The second—namely, that the particular agent be bound by some legal obligation to do or to omit the action, necessarily follows from the first, for it cannot be imputed to him unless he himself be bound by that obligation.

The third, which requires a connection between the effect produced and the act of the person, and a knowledge of such connection on his part, follows from the axiom, *Casus fortuiti a nemine præstantur.* Thus Justinian decides, that if a man lopping the branches of a tree give due warning to passers by, he is not liable if any one be injured by the fall of the branches.[b] He could not know that mischief would be caused by his act (which was itself lawful), done with all due caution. The occurrence was fortuitous. But it is material to this decision that the act was in itself lawful: for Justinian decides, that though if a soldier exercise himself in a usual place set apart for the purpose and in the usual way, he is not liable for an accident occurring thereby; yet if the same thing be done by a person having no right to do so—for instance, if he amuse himself by throwing a javelin, he is liable for accidents.

Paulus gives this reason, *Lusus noxius in culpa est.*[c] There, though the mischief was caused by a casual occurrence, yet that action was given rise to by an unlawful act,—the Roman Law forbidding such dangerous games. The act of throwing the javelin was unlawful in itself, and therefore the consequences are imputable to the wrong-doer. Thus in our law, if a man commit a burglary or any other felony, and in the prosecution of that crime he kill any one accidentally, he is guilty of murder. And if a man, when engaged in a dangerous or unlawful sport (*malum in se*), kill another by accident, it is man-slaughter. If the sport were lawful and not dangerous, it would be homicide by misadventure only (Archbold, Crim. Plead. 439).

[a] L. cxliv., et l. cxcvii., ff. De Reg. Jur.
[b] Inst. L. iv., tit. ii., § 5.
[c] Instit. *ibid.*, § 4; L. x., ff. Ad Leg. Aquit.

It may, however, be doubted whether the Law of England does not extend the principle of the Civil Law too far in determining the degree of criminality of the act. Thus it has been held (Fost. 258), that if a man shoot at another's poultry with intent to steal them, and by accident kill a man, it is murder. The accident is indeed justly imputed to him; but the degree of his guilt is not, on any sound principle, the same as if he had intended to shoot the man, or even had been careless whether he shot him or not, and it should therefore not be held to be murder.

These principles of general jurisprudence, respecting the imputability and imputation of human actions, may perhaps appear somewhat subtile and metaphysical, but they are a necessary part of the science, and from them may be traced the rules whereby many difficulties are solved in the actual administration of justice.

We will now proceed to the third part of the definition of theft—namely, *lucri faciendi gratia.*

The meaning of this, as Vinnius explains, is that, to constitute theft, the intention of the party must be to acquire or appropriate the thing stolen, or to derive some benefit therefrom wrongfully, and to the injury of the person entitled to the thing or benefit.[a] Thus, as Voet shows, to take the property of another and destroy it is not theft.[b] It is a different sort of offence.

As Ulpian says, regarding another case governed by the same principle, *turpius fecit quam qui subripit: certe fur non est.*[c] But if a man take that which is not his for the purpose of giving it away, this is taking it *lucri gratia;* for, as Gajus says, *species lucri est ex alieno largiri.*[d]

We have now reached the last part of the definition, which includes within the law of theft the *use or possession* of things as well as the things themselves.

The principle of the law is, that the fraudulent taking of the *use* of a thing is a theft of the use, as the fraudulent taking of the thing would be a theft of the thing itself.

Thus a person with whom property is deposited is guilty of theft by the civil law, if he wilfully and fraudulently uses it, to the injury of the owner. And if a man fraudulently use the property of another to his injury, this is a theft of the use.[e] And a debtor who fraudulently takes

[a] Vinn. Comm. ad Instit., lib. iv., tit. i.
[b] Voet. ad Pandect. l. xlvii., tit. i, § 8.
[c] L. xxxix., ff. De Furt.
[d] L. liv., ff. De Furt.
[e] Instit. *ubi supra,* § 6; Voet. ad Pand., lib. xlvii., tit. i., num. 5.

from his creditor goods which he has given to him by way of pawn is guilty of the theft of the possession of the goods.[a]

We have now taken a rapid view of the principles of the Civil Law respecting theft. It appears, from this investigation, that the Civil Law of theft is more comprehensive and more simple than the Common Law. The Civil Law does not distinguish theft from obtaining goods under false pretences, nor from embezzlement. Both these distinctions, as the commissioners on the Criminal Law show in their first report, cause very great difficulty in practice. The cause of this difficulty is, that the distinctions in question are not founded on any sound principle or reason of law. They are merely technical.

The same observation applies to the rule of the Common Law, that a stranger cannot commit theft by taking the goods of the husband by the delivery of the wife, unless he be her adulterer. It is not so in the Civil Law:[b] and the effect of the rule is so absurd in practice, (the jury being obliged to try a question of adultery on an indictment for theft,) that we may well wonder that it has not been abolished.

I trust that I have now shown that we have something to learn from the Criminal Jurisprudence of the Civilians.

[a] Instit. *ubi supra*, § 10.
[b] L. lii., ff. De Furtis.

NINTH READING.

(*Trinity Term*, 1850.)

ON THE CRIMINAL JURISPRUDENCE OF THE CIVILIANS.

The science of Criminal Jurisprudence owes less to the civilians and jurists than the other branches of law, in which indeed the value of their works is more conspicuous and acknowledged. Yet my last Reading has probably shown that even in that science advantage may be derived from their learning and wisdom to illustrate and improve our own law.

Hence may be drawn a confirmation of the position which I have throughout my labours insisted upon—that Municipal Law ought to be cultivated on the broadest basis compatible with accurate knowledge of detail. It should be enriched and fertilized with the most abundant supply that may be of the learning of other branches of law. Thus we have seen that there is a necessary connection and concatination of all branches of jurisprudence one with the other—the same principles running through them all, so that no one can be separated from the others without injury to its utility, even for the most strictly practical purposes. There is one class of laws with regard to which this is obvious—namely, immutable laws which spring from the two primary laws of duty to God and to our neighbour, and which, whatever may be the subjects to which they apply, and which they regulate in the infinite details of human life, form one system of practical philosophy, carrying into effect the scheme of government appointed by Divine authority on earth.

And even as to the other class of laws—those which are arbitrary and mutable by human authority, they also are, or ought to be, subservient to two great primary laws; and they have a peculiar equity, consisting in their adaptation to and harmony with the ends of the community, wherein they regulate a wonderful variety of matter designed for different purposes, public or private. This vast scheme of laws and regulations, therefore, manifestly has a certain unity even in its complexity, and must be considered as forming one great science—the science of *universal jurisprudence*. The lawyer and the legislator who does not take a comprehensive view of his duties, and who there-

fore confines his mind to the exclusive study of one branch of that science, will not, except by a rare effort of mental power, be thoroughly master even of that branch, and he will be unequal to the task which the course of events may probably cast upon him.

To these—another reflection should be added, strongly confirmatory of the same views. It is derived from the nature and spirit of our national institutions.

The fundamental principle of those institutions is *government by law*. So Fortescue (De Laud. ch. xxxiv.) says that a king of England "does not bear such a sway over his subjects as king merely, but in a mixed political capacity: he is bound by his coronation oath to the observance of the laws." And the same principle (which had before been laid down by Bracton) runs through every part of our public administration; so that it has often been observed by foreign writers, that in England the spirit of law and legality has been carried to a greater extent in practice than has been done in any other country. And this spirit of legality is to be seen even in those parts of our history in which it would least be expected—even in our revolutions;—and it has carried the nation comparatively unharmed through many a dangerous convulsion.

We see another example of its effects in the United States of America, whose institutions probably owe a great part of their success to this spirit, which its citizens derived from their mother country.

That great and powerful operation of the principle of *government by law* argues the excellence of our constitution. This position is supported by the following ingenious and valuable observations of the learned Venetian, Cardinal Contarini, in his book on the constitution of his own city:—[a]

"It has been much doubted whether the government of a city should be given to one man, to a few, or to the multitude. And it seems to me that it has been most excellently and wisely held that the government of men ought not to be granted to one man; but that there must be something more divine to which the office of government should be given. And this may be seen clearly from the example of animals, which are under the rule not of one of their own nature, but of a far more excellent creature—that is to say, man. Therefore as the commonwealth is ordained for the government of its citizens in the exercise and use of the duties of life and of virtue; the highest reason shows that something more excellent than man ought to govern men, in order that those objects may be successfully attained.

"But as no creature in this world is of a more excellent nature than

[a] Della Repub. e Magistr. di Venetia del Card. Contarini, lib. i., pp. 22, 23.

man; and he is an animal constituted of different parts, being similar to beasts in the inferior impulses of his mind and approaching a divine nature in the superior powers of his soul, it is therefore right that that which in man is divine should have the office of government. This office must therefore not be entrusted to a man, for he is often swayed and diverted from the paths of reason by the inferior forces of his mind; but it should be committed to the mind pure and free from those perturbations. And for this reason, as that object could not otherwise be effected—it seems that by the invention of *Laws*, mankind has by Divine council obtained this,—that the office of governing commonwealths be committed to the mind, and to reason free from passions. I know not whether this gift of God can be deemed inferior to any other, if the utility of laws be judiciously considered. . . . . From these things I think I have proved that government ought to be given, not to man but to the laws; and that a very few things—those only which cannot be included in the laws—may be left to the arbitrium or discretionary power of man."

These profound reflections of Contarini, who had acquired experience in some of the highest offices of his Republic, are remarkably in accordance with the celebrated description of Law by Papinian in the Pandects: *Lex est commune præceptum; Virorum prudentum consultum; delictorum . . . . coercitio; communis reipublicæ sponsio.* And so Hooker, in the first Book of his Eccles. Polit., § 10, says, "Even they which brook it worst that men should tell them their duties, when they are told the same by the Law, think very well and indifferently of it. For why? they presume that the Law doth speak with all indifferency: that the Law hath no one-side respect to their persons: that the Law is as it were an oracle proceeding from wisdom and understanding. Howbeit, that Laws do not take their constraining force from the quality of such as devise them, but from that power which doth give them strength of Laws."

It follows, from this doctrine of Public Law, that the best government is that, which leaves to the arbitrary discretion of man nothing which may be defined, without inconvenience, by the Law. It is true, that there may be bad Laws, and that Contarini seems to speak only, or at least especially, of such laws as are *Virorum prudentum consultum*, or are framed on grounds conceived *bonâ fide* to be for the welfare of the community. But his doctrine is sound, for upon the whole, the *commune præceptum* of the law is of a more excellent nature than the arbitrary determinations of man made *pro re nata*;—and thus there have been few despotic governments, if any, so despotic as to be without Laws.

We may conclude that our adherence to the principle of govern-

ment by law, constitutes in no small degree the excellence of our national institutions.

But does not that very fact irresistibly lead to the conclusion that, in this country especially, the high and perfect cultivation of the science of Law is a matter of the utmost public importance? Government by Law being the leading principle of our constitution, it follows that the improvement and the study of Law on the noblest and most scientific plan must be one of the highest duties of an Englishman, on which depends in great measure the future welfare of this country. The dignity and greatness of our profession, in which we far surpass our brethren in other countries, spring from the same principle; for to that profession is intrusted the chief share of the administration of the Law whereby the whole empire is governed. Therefore a high standard of learning is set before us. Much is required of us. More *will be* required as the intelligence of the country increases, and the course of events renders (as seems probable) the office and duty of government more and more difficult. In some countries indeed civil government seems to be becoming almost impossible, unless a series of temporary shifts and expedients supported by standing armies can be called civil government. From the chief causes which have produced that dangerous state of things this country is happily exempt. But it is nevertheless true that, even here, the Law and those intrusted with its administration must keep pace with the increasing difficulty of their duties. And if ever the Bar of England should fall into a state of general mediocrity, and become a mere means of obtaining a livelihood or acquiring wealth, the constitution of this country will have a severe trial to undergo.

Whether there be or be not any appearance of a future danger of this kind, it is not for me to say; but it will probably not be disputed that the legal profession is liable to be unduly affected by the mere commercial view of its functions. Lawyers may possibly consider that they are to acquire such knowledge, and such knowledge only, as they can most speedily convert into money. Little knowledge suffices, with ready access to books of reference, for the daily business of most men, even in considerable practice. Thus there is a constant tendency towards a respectable mediocrity, which, however useful, excludes all the higher and greater attributes which the public service requires of judges, law-officers of the Crown, and of statesmen learned in the law in both houses of Parliament. And the effect of this mediocrity must also be, that even the daily business of the Barrister in Court and in chambers will be done, perhaps sufficiently well for practical purposes, but not in a masterly manner.

I have suggested these reflections to you, not only because they

point out the importance of the augmentation of legal learning, but in order to show for what purpose I endeavour to bring before my hearers many things which are not necessary for the actual daily practice of the Bar. Those things, though not strictly necessary, are not mere ornaments; for they assist the comprehension and use of the practical part of the Law; and they open the mind to extended and masterly views —requisite for the higher duties which the Lawyer owes to his country. So Cujacius says, speaking of Public Law:—*Id incognitum est, quod minus in usu necessarium. Sed nunquam bene percipimus usu necessarium, nisi et noverimus jus istud usu non necessarium. Nexum est et colligatum alterum alteri.*[a]

In pursuance of these objects, I shall continue the exposition of some portion of the Criminal Jurisprudence of the Civilians; and I shall do so the more willingly because they supply certain fundamental principles and general doctrines which are not to be found in our own writers, except here and there, and very briefly, in Blackstone and in Lord Hale's Pleas of the Crown.

Having examined the Civil Law respecting theft, with especial reference to the English Law of larceny, we will now proceed to consider certain matters of a more general nature concerning wrongs, and their legal remedies.

The Civil Law divides all obligations not springing from consent or contract into the following three classes:—1st. Obligations *quasi ex contractu;* 2ndly, Obligations *ex delicto;* and 3rdly, Obligations *quasi ex delicto.*

The Law is the source mediate, or immediate, of all obligations. All obligations arise either from a contract—that is to say, the consent of the party,—or without contract. Those of the latter description spring either from the law *immediately*—that is to say, without any act of the party or any one else; or from the law *mediately*—that is to say, on the occasion of some act done.

Thus the obligation to pay taxes and to perform certain public duties springs immediately from the Law. These obligations are called, by Lord Stair, *obediential.*[b] But the obligation of a man to repay what has been paid to him erroneously, not being due, arises from the law mediately, for it is the erroneous payment that calls the obligation to repay into existence. So the obligation to make compensation for a wrong arises mediately from the Law, and immediately from the wrong done. Now the act on the occasion of which the law raises an obligation may be a lawful act, or it may be an unlawful act—that is

[a] Cujac. Op., tom. vii., col. xv. A.; In tit. Dig. De Just. et Jur., lib. i., § 2.

[b] And see Pothier, Tr. des Oblig. num. 123.

to say, it may be an act not wrongful, or a wrongful act. Thus a person receiving *bonâ fide* what is not due to him does not commit an unlawful act, yet he must restore what he received. But a thief is bound through an unlawful act, to restore the stolen property.

Trebonian incorrectly gave the name of *quasi contract*, to all obligations which spring neither from consent nor from an unlawful act.[a] I say incorrectly, because the term *quasi contract* cannot be correctly applied to obligations arising without consent, which is implied by the very word contract.[b]

We come now to obligations arising from an unlawful act—that is to say, from the Law, on the occasion of an unlawful act. They are of two classes:—obligations *ex delicto*, and obligations *quasi ex delicto;* or, as they are called by Trebonian, *ex maleficio, vel quasi ex maleficio.*[c]

The great commentator on Criminal Law, Boehmerus, expresses this somewhat differently, for he says that *delicta*, taking the word in its widest sense, are divided into two classes—namely, *vera delicta*, or *delicta* strictly so called, and *quasi delicta.*[d]

We must now define these two sources of obligations. In the first place, the violation of some Law is essential to the nature of a wrong. It is, in the words of Ulpian, some action—*Quod non jure factum est, hoc est contra jus.*[e] If the act be productive of mischief indeed, but not contrary to some law, it is *damnum absque injuriâ.* Where there is no legal right there is no injury; an important principle, which is exemplified in *Ashby* v. *White*, and the note appended to that case, in 1 Smith, Lead. Cases.

We have here to deal only with wrongs consisting in the violation of Municipal Law. But it must be borne in mind, that as Municipal Law does not enforce all obligations, an act which is not a wrong by Municipal Law, may nevertheless be a wrong by Natural Law. So Paulus says, *Non omne quod licet honestum est.*[f] On the other hand, the act may be a violation of both Laws together; such, for instance, as a theft or an assault.

Such is the general legal nature of a wrong, under which denomination are included both *delictum* and *quasi delictum*. They are comprised in Boehmerus's definition of *delictum*, taking the word in its general acceptation. *An offence, or wrong* (*delictum*) *is a spontaneous action or omission contrary to law. Delicta sunt spontaniæ actiones*

[a] Instit. lib. iii., tit. xxviii., princip.
[b] Toullier, Droit. Civ., lib. iii., tit. iv., § 15.
[c] Instit. lib. iv., tit. i., princip.
[d] Boehm. Elem. Jur. Crim., sect. i., § 29.
[e] L. v., § 1, ff. Ad Leg. Aquit.
[f] L. cxliv., et l. cxcvii., ff. De Reg. Jur.; L. xlii., ff. De Signif. Verbor.

vel omissiones Legibus contrariæ.[a] So Blackstone says, "A crime or misdemeanor is an act committed or omitted in violation of the public Law, either forbidding or commanding it."[b]

We will examine these definitions.

An omission, as well as a positive act, may be an offence—*delictum*,—a crime or misdemeanor. This position is supported by two passages of Arrius Menander in the Pandects.[c] And it is a consequence of the celebrated Law of Modestinus, in which he describes the effect of laws. *Legis virtus hæc est; imperare, vetare, permittere, punire.*[d] The law may command as well as forbid, and therefore it may be violated as well by an omission as by a positive act.

An offence (*delictum*) is a *spontaneous* act or omission. This part of the definition depends on the doctrine of the imputability and imputation of human actions explained in my last Reading.[e] No act or omission can be *delictum* (including in that word every species of wrong), unless it be *imputable*—that is to say, unless the person charged be morally the author of it, and if it be not also justly *imputed* to him, by reason of a connection between some act or omission on his part and the result or effect thereof, of which connection he had or ought to have had a knowledge. So the act of an infant child or of an idiot is not *imputable*. And if a man wilfully throw himself under a carriage going at full speed, the mischief is not *imputed* to the driver, because he did not know and was not bound to know that his driving at full speed would cause the death of the man. But the act of so driving is *imputable*, and therefore the driver is responsible for whatever consequences of the act he foresaw, or ought to have foreseen, would or might probably result from his act. So where the natural and probable consequence of an act is injury to somebody, the act is illegal; and if it be an imputable act and mischief result, it is imputed to its author. This principle is exemplified in *Scott* v. *Shepherd*, 1 Smith, Lead. Cas. 210. So the omission of an act commanded by the law but which the person in question had it not in his power to do is not imputable, and therefore cannot justly be imputed to him. It is laid down in Co. Litt. 231. b., *Lex non cogit ad impossibilia*, a rule taken from Celsus in the Pandects, and from which (as it is learnedly shown in Broome's Legal Maxims, p. 181) many important legal consequences flow. If the unlawful act or omission be justly imputed to the person in question, then he is guilty

[a] Boehm. Elem. Jur. Crim., sect. i., § 29.
[b] 4 Black. Com., ch. i., p. 5.
[c] L. iii., ult. et lib. vi., § 8, ff. De Re Milit.
[d] L. vii., ff. De Legib.
[e] Lampredi, Diritto Publ. Univ., tom. i., cap. iii.

either of a crime or misdemeanor (*delictum*),—or of (*quasi delictum*) a simple wrong,—a distinction which shall be explained.

It follows from the same doctrine that (as Pothier shows)[a] no persons are capable of committing either species of *delictum*, except those who have the sufficient use of their reason, for if they have not, their actions are not imputed to them.

The reason of this further appears from Pothier's definition of *delictum*, and of *quasi delictum*.

"*Delictum* (a crime or misdemeanor), is an act (or omission) whereby a person with criminal intent or malice causes injury or wrong to another.

"*Quasi delictum* (a simple wrong), is an act (or omission) whereby a person without malice, but by an imprudence which is not excusable, causes injury to another."[b]

I have shown that *delictum*, strictly so called, and *quasi delictum* have this in common, that the act must be done or omitted, as the case may be, with free will or power of choice,—otherwise it is not imputable. But *delictum*—a crime or misdemeanor—has this distinctive feature (as appears from the definitions), that it is done with criminal intent or malice. Lord Coke (3 Inst. 107) lays down this rule, taken from the Civil Law: *Actus non facit reum nisi mens sit rea.* No crime or misdemeanor can be committed without criminal intention. And Lord Kenyon says, in 7 Term Rep. 514, "It is a principal of natural justice and of our Law that the intent and the act must both concur to constitute the crime."

The intention of the party at the time of committing an act charged as an offence is essential to support the charge; but that intention need not be a specific intent to break the law, nor a malicious desire to do a particular injury. Where the law forbids a thing, it is an offence to do it; and so it is laid down as a general proposition, in East, P. C. 231, that if an act manifestly unlawful and dangerous be done deliberately, the mischievous intent will be presumed, unless the contrary be shown. So it is laid down, in Foster, P. C. 255, that the Law presumes every homicide to be murder until the contrary appears.

The true meaning then of the rule of Lord Coke, just cited, is that to constitute a crime or misdemeanor the act must be done wilfully—that is to say, it must be committed by a person having the power not to commit it, and capable of seeing it to be contrary to Law. The same doctrine applies to crimes of omission.

Thus, in *Macnaughten's case*, the judges, in answer to questions

[a] Pothier, Tr. des Oblig., num. 118.

[b] *Ibid.*, num. 116.

proposed to them by the House of Lords, held, that notwithstanding that the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew, at the time of committing such crime, that he was acting contrary to Law.[a]

So, if a man, not being insane, kill another without any malice, but intending to extricate him from some difficulty, or deliver him from some pain or danger,—he is nevertheless guilty of murder, because he knew the act to be illegal. With regard to illegal acts which are not *in se* criminal—that is to say, contrary to Natural Law or Religion,—the same principles apply; for (according to the doctrine laid down in Justinian's Code) no man is permitted to obtain impunity by pleading ignorance of the public laws of his country.[b]

We have seen that Lord Kenyon holds both the intent and the act necessary to constitute a crime. And it is laid down by Lord Mansfield,[c] that so long as an act rests in bare intention it is not punishable. Such is the meaning of the rule of Ulpian—*Cogitationis pœnam nemo patitur*.[d]

In the case of treason, however, the maxim, *voluntas reputatur pro facto*, cited by Lord Coke, 3 Inst. 5, 69, applies. Pufendorf justly observes, that an intention to commit a crime is not so criminal as an attempt, because the latter shows something stronger than a bare intention, and greater malice.[e] Yet there may be crimes, such as treason, of so pernicious a character, that the intention to commit them may deserve equal punishment with the crime actually consummated. But as human laws only punish external acts, even here the rule *cogitationis pœnam nemo patitur* has its application; for the criminal design must appear by some overt act towards effecting such design. And so Mathæus holds.[f]

Thus, Lord Hale, 1 P. C., ch. xiii., writes as follows, on the first article of the stat. 25 Edw. III., which makes it treason to compass or imagine the death of our Lord the King, or of our Lady the Queen, or of their eldest son and heir:—"Compassing or imagining singly of itself is an internal act, and, without something to manifest it, could not possibly fall under judicial cognizance, but of God alone; and therefore

[a] 10 Cl. & Fin. 200.

[b] Voet, Com. ad Pand., lib. xxii., tit. vi., § 1; L. ix., Cod. de Legibus; L. xii., Cod. de Jur. et Fact. Ignor.; but see Voet, Com. ad Pand., lib. xxii., tit. vi., §§ 3, 4.

[c] *R.* v. *Higgins*, 2 East, 21.

[d] L. xviii., ff. De Pœnis.

[e] Pufend. Droit des Gens, lib. viii., ch. iii., § 18.

[f] Mathæus, De Crimin. Prolog., cap. i., §§ 5, 6.

this statute requires such an overt act, as may render the compassing or imagining capable of a trial and sentence by human judicatories.[a]

"And yet we find that other laws, as well as ours, make compassing or conspiring the death of the prince to be *crimen læsæ Majestatis*, though the effect be not attained."

Lord Hale cites a law of Arcadius and Honorius, in Justinian's Code,[b] to that effect, from which our own law was probably derived.

I have now sufficiently explained the general nature of *delictum*.

The general principle on which all obligations *ex delicto* and *quasi ex delicto* are founded is that laid down by Grotius, namely, that *every act of any man which causes damage to another, obliges him by whose fault that damage was caused to make reparation.*[c]

That principle is a consequence of the precepts of natural law, given by Ulpian—*Alterum non lædere, suum cuique tribuere.* And it embraces damage done without as well as with the criminal intent, which, as we have seen, constitutes *delictum*. Thus, Ulpian expressly lays it down, that *injuria*—a wrong—includes damage done by a fault or imprudence, even by one who had no intention to injure.[d]

Negligence or imprudence renders a man liable, because the precept of Natural Law, *Alterum non lædere*, implies the obligation of taking due care not to do anything, or to omit any act, so as to prejudice the rights of others. Thence arises the obligation to make reparation for injuries done by want of such due care.

Both species of wrongs, *delicta* and *quasi delicta*, may be either public or private, as they injure an individual in his private capacity or the commonwealth itself. This distinction requires to be carefully examined.

In the first place, as the protection of private rights is one of the chief objects for which human society is designed, every violation of the rights of individuals is an injury against society, because it is a disturbance of the order of society, and tends to defeat its purpose. And there are offences, such as treason and sedition, which directly violate the public law, and are public wrongs against the community in its politic capacity.

What, then, is the distinction between public and private wrongs? In the Civil Law that distinction is grounded on historical reasons explained by Mathæus, and other learned commentators, which it is

[a] And see stat. 7 & 8 Will. III. c. 3, s. 8.

[b] Lib. v., cod. ad Leg. Jul. Majestatis; and see also lib. vi., princip. cod. de his qui ad Eccles. Confug.; and Mathæus de Crimin. *ubi sup.*

[c] Grot. Dr. de la G., lib. ii., ch. xvii., § 3.

[d] Lib. v., §§ 1, 2, ff. ad Leg. Aquil.

unnecessary to examine here.[a] But the principle of that distinction, both in the Civil and in the English Law, arises from the diversity of the remedies provided for different species of wrongs, or for wrongs regarded as affecting either individuals or the community at large.

Thus the law, regarding certain wrongs as injuries to the rights of individuals as such, provides a remedy consistent with that view of the nature of the injury, and compels the wrongdoer to make reparation.[b]

But where the wrong affects the community in its politic character, or violates the peace or general welfare of society; and where the remedy compelling the offender to make restitution or reparation to the person directly injured would be insufficient by itself for the protection of society, there the law provides a public remedy by the punishment of the wrongdoer.

The former class of wrongs are private, and the latter are public, wrongs. And it appears, from these principles, that an act may be looked upon by the law in the light both of a private and of a public wrong. Thus the Civil Law dealt with the law of theft by compelling restitution, and also by punishing the thief. This double remedy was necessary. In the first place, according to the equitable rule of the Canon Law, *spoliatus ante omnia restituendus est.* But the mere restitution of the stolen goods would be manifestly insufficient to protect the rights of property. So, in many other instances, the public remedy of the Criminal Law is required to discourage, if not to prevent private wrongs.

Thus Blackstone says, "The law has a double view—namely, not only to redress the party injured, but also to secure to the public the benefit of society, by preventing or punishing every breach of those laws which the sovereign power has established for the tranquillity and government of the whole."[c]

It is a question of public policy in each particular description of case of this nature, whether the civil remedy is sufficient, or whether the injury to private rights ought not, for the protection of society, to be also visited with punishment as a public wrong. Consequently, no general invariable rule can be discovered, settling the boundary between Criminal and Civil Law. That boundary must vary in different countries, and according to the circumstances and the requirements of society.

But it is important to remember, with regard to the distinction in question, that the prosecution for a public wrong ought not to

[a] Mathæi Comm. de Crimin. Prolog. cap. iv. § 8.
[b] Voet ad Pand., lib. xlvii., tit. i., § 2.
[c] 4 Black. Comm. ch. i. § 1.

exclude the person directly injured from his civil remedy. The reason of this, given by Cremani, is, that whereas the punishment of offences is by Civil or Municipal Law, the obligation of restitution or reparation of injuries is of Natural or Immutable Law.[a] Thus he lays it down, that a criminal homicide is legally bound to pay the expenses of the medical treatment of the deceased, and to indemnify for their loss those whom he was bound to maintain; such, for instance, as his wife and children.[b] And so the Decree of Gratian says, (Quæst. vi., cap. i., 14,) *Peccatum non remittitur nisi restituatur ablatum;* from whence comes the common maxim, *spoliatus ante omnia restituendus est.*[c]

On these principles is founded the stat. 9 & 10 Vict. cap. 93, which provides that an action is maintainable against any person causing the death of another by any wrongful act, neglect, or default; and that such action shall be for the benefit of the wife, husband, parent, and child of the person whose death was so caused.

This principle, indeed, is not altogether foreign to the Common Law. The law gives no private remedy for anything but a private wrong. Therefore no action lies for a common or public nuisance, but an indictment only, because the damage is common to all the subjects of the Crown. But where a private person suffers some particular damage beyond his fellow subjects, by a public nuisance, in that case he shall have a private satisfaction by action. As, if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action.[d]

We have now taken a general view of the legal nature of wrongs, and the leading principles by which their different species are distinguished.

The subject of this Reading embraces the rudiments and first principles of a large portion of the legal science. They are necessarily presented somewhat briefly, for I have given you a broad view of the subject and results obtained by comparing the labours of many learned men.

[a] Cremani de Jur. Crim., lib. i., pars ii., cap. ii., §§ 5, 6; and see Mathæus de Crimin. Prologom., cap. iv., § 9.

[b] Cremani, *ubi supra*, § 8.

[c] See the Decretals, lib. ii., tit. xiii.

[d] 1 Black. Com., ch. xiii., § 2, p. 219.

TENTH READING.

(*Trinity Term*, 1850.)

ON THE REASONS OF LAWS.

Mr. Butler states, in his Reminiscences, that Lord Mansfield blamed Lord Coke for giving a reason for everything in the law. Lord Mansfield, no doubt, had present in his mind that passage from Julian, in the Pandects, which says that a reason cannot be given for all that our ancestors have established. *Non omnium quæ a majoribus constituta sunt ratio reddi potest.* And thus there is a text in the Pandects where no less an authority than Cajus is unable to account for a certain point of law. He says, *Miror quare constare videatur.*[a]

Some things must in every system of law occur, the reasons of which are lost in antiquity, or are so trifling that they have not been handed down to posterity; or are of a complex and doubtful nature. And many things in the laws of all countries are purely arbitrary, and grounded on no reason, except the necessity of drawing a line somewhere, or of making a regulation on the particular subject which should not be inconvenient. Cujacius, in commenting on the passage of Julian cited above, gives several instances of this sort, where no reason appears, and nothing remains but to observe the law as it is written, investigating only its true meaning.[b] This is especially the case in what Domat designates as arbitrary matters, which are certain usages or establishments invented for particular purposes by man (such as feudal tenures and entails); though, even in those arbitrary matters, there are immutable laws; and they themselves, though arbitrary and artificial, have their foundation in some principle of the order of society.[c] But even in matters appertaining to Natural Law, which are so natural and so essential to our common wants that they have always been in use in all places, there are purely and strictly arbitrary laws the reason of which is unknown or never existed.

[a] Lib. ix., ff. De Religiosis.

[b] Cujac. Op., tom. vi., col. 378; edit. Venet. Mutin. And see Savigny, Traité de Droit Rom., vol. i., p. 215. Paris, 1840. . . . . *In facto potius quam in jure consistet.* Lib. x., ff. De Capit. Minut.

[c] Domat, L. Civ., Traité des Loix, ch. xi., § 12.

I do not refer to those laws which Hooker, in his Ecclesiastical Polity, calls *merely human*, the matter of which is anything that reason *but probably* teaches to be fit and convenient.[a] If legislation were perfect, all arbitrary laws would be of that kind, and dictated by some sufficient reason. But this is obviously not so in any country.

Here we see the profound meaning of Lord Mansfield's observation. It is very important to distinguish the laws which he alluded to from those of another description, because the result of finding a reason for laws of this nature is to introduce fanciful and unsound notions. Such reasons ought (as Neratius teaches) not to be entertained, lest they produce uncertainty, or change the effect of the law.[b]

These principles should always be kept in mind, when we inquire into the reasons of any law.

The reasons of many laws in all countries are merely historical or political. This is a subject which deserves some examination, because the use and bearing of that class of reasons differ essentially from those of reasons purely legal.

Grotius thus distinguishes between law and politics:—"I have abstained from touching that which belongs to another subject, such as the rules of what is expedient. That is the province of another science —I mean *Politics*. Aristotle correctly treats that subject by itself, unmingled with any other; instead of which Bodinus often confounds it with the science of Law."[c] The judicious Barbeyrac remarks on this passage, that though sound policy sanctions nothing but what is just; yet *justice* and *utility* are two separate and distinct things, even in politics. Thus, to undertake war legally, there must be a just cause of war. But, however just the cause, it may be highly prejudicial to the commonwealth to engage in war, and to do so under such circumstances would be an error in politics.

This may appear at first sight opposed to what Cicero says, *Eadem utilitatis quæ honestatis est regula:* but it is not really so.[d] The context shows his meaning to be, that nothing is really and permanently useful, except what is just. So far from supporting the theory of those who hold utility to be the test or rule of justice, he maintains that justice and morality are the only true and sound test of utility. Thus he brings them under one rule—namely, that of right and wrong, so far at least that nothing is to be done, on the plea of utility, contrary to the dictates of justice and sound morality. And these opinions of the wise Roman cannot now be called in question, because there is nothing

[a] Hooker, Eccles. Polit., b. i., § 10.
[b] Lib. xxi., ff. De Legib.
[c] Grot. de Droit de la G., Disc. Prélim., § 59; and see § 17.
[d] Cic. de Offic., lib. iii., c. xviii.

in the Christian religion to sanction the opposite doctrine of those who, following the ancient Epicureans,[a] make utility the first principle and rule of justice and morality.

The Roman jurisconsulti do not confound justice with utility. Ulpian defines justice by itself and apart from its effect on society: *Justicia est constans et perpetua voluntas suum cuique tribuendi. Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere.*[b]

Domat indeed lays it down, in the preface of his Public Law, that all laws which regard the conduct of men among themselves, being nothing else but the rules of the society in which God has placed them, it is in this order that we must discover that of the said laws and their subject-matter. And he adds, that it is for this reason that he prefixed to his book on Civil Law a treatise establishing the first principles and foundations of the order of society, of which he then drew a plan, in order to give a view of the matters themselves and the laws relating to them. The order and plan of society were a necessary part of his subject, because without them he could not show the relations of men with each other, which are regulated by different sorts of laws. But he does not make utility to society, or the interest of society, the first principle of natural or immutable law.

That great civilian lays it down, that the surest way of discovering the first principles of laws, is to begin by two prime truths which are only bare definitions. One is, that the laws of man are nothing else but the rules of his conduct; and the other, that the said conduct is nothing else but the steps which a man makes towards the end for which he was created.

From thence he deduces the first law of man—that is to say, the love of God, which is the foundation and principle of all others. And this law, being common to all mankind, implies the second law, which obliges them to unity among themselves, and to love one another.[c] On these two laws the society of mankind is founded, and all other laws are linked in some way or another to them.[d]

For the purpose of uniting men in this society, the Divine Will has made it essential to their nature; so that a nation living in what has been erroneously called a state of nature, entirely separate from each other, under no common government, and not acknowledging any social ties whatever, nor any connection with the rest of mankind, would be universally considered as very strange and unnatural.[e]

[a] Cujac. Op., tom. vii., col. 48; Ad lib. ix., ff. De Just. et Jur.

[b] Lib. x., ff. De Just. et Jur.

[c] Div. August. De Civit. Dei, lib. xix., c. xiv.

[d] Domat, Loix Civ., Traité des Loix, ch. i.; St. Matt. xxii. 38.

[e] See the Observations of Cujacius, Op. tom. vii., col. xlviii., D. E. edit. Venet. Mutin., Ad lib. ix., ff. De Just. et Jur.

And as we see in the nature of man his destination to the accomplishment of the first law (which is shown very fully by St. Augustine in the 19th book of his treatise *De Civitate Dei*), so we also discover therein his destination to society, and the several ties which engage him to it. And these ties, which are consequences of the destination of man to the exercise of the first two laws, are also the foundation of the particular rules of all his duties, and the fountain of all laws.

We must here answer an observation which may be made on the state of human society, and which applies to all countries, some in a greater and some in a lesser degree. It is, that though society ought to be founded on those two primary laws, it does nevertheless subsist, notwithstanding that the spirit of those laws has little influence, so that it seems to be maintained by other principles. On this point Domat observes, with profound wisdom, that although men have violated these fundamental laws, and although society be in a state strangely different from that which ought to be raised upon these foundations and cemented by this union, it is still true that these Divine laws, which are essential to the nature of man, remain immutable, and have never ceased to be obligatory: and it is likewise certain, that all the laws which govern society, even in the condition in which it is at present, are no other than consequences (real or supposed) of these first laws.[a] Municipal Laws may be more or less adapted to the end for which they ought to be framed; but such is the nature which the Creator has given to man, that all Municipal Laws not repugnant to that nature must be consequences direct or indirect of two primary laws. And so Suarez lays it down, that all human laws are originally derived in some way or another from Divine law, and he cites this fine passage of St. Augustine:—*Conditor legum temporalium, si vir bonus est et sapiens, legem æternam consulit, ut secundum ejus immutabiles regulas, quid sit pro tempore jubendam vetandumque discernat.*[b] And the great canonist, Reiffenstuel, holds that all laws are derived from the Eternal Law.[c] The doctrines of these great foreign jurists, philosophers, and theologians are confirmed by the authority of our own Blackstone.

We may safely conclude, that though no laws can be useful that are not just, yet justice and utility are distinct principles, or reasons, on which laws may be founded. This distinction is a natural consequence of the diversity between natural or immutable laws, which cannot be altered without injuring the essential principles of human

[a] Domat, *ubi supra.*

[b] Suarez, De Legib., lib. i., c. iii., § 17; Div. August. De Vera Relig. c. xxxi.; and see 1 Black. Com. Introd., § 2.

[c] Anaclet. Reiffenstuel, Jus Canon. Proæm. § 13.

society contained in the two primary laws, and mutable or positive laws, which may be altered or repealed as the prudence of the legislature may determine, having regard to the circumstances and interests of the community.

It follows that some Municipal Laws are grounded on reasons of Natural Law, or are framed for the purpose of carrying into practical effect certain principles of Natural Law, and derive their reason from that purpose: while others have for their object to fulfil various uses for the benefit of the community, and are founded on reasons of utility or policy. These are within the province of the science of politics.

Thus, Vattel says that all laws ought to have reference to the welfare of the community; but that those which are framed with a direct view to the public good are Political Laws. And he gives, as an example, what he calls Fundamental Laws—that is to say, those which concern the very body and essence of society, the form of the government, and the manner in which the public authority is to be exercised.[a] As an other example, we may mention all laws, the object of which is the prosperity of commerce, trade and navigation; the regulation of the currency; and other matters appertaining to political economy; which is a branch of the science of politics.

All these laws have a necessary connection with the two Primary Laws, because they ought to be framed for the public advantage; and they are bad laws unless they fulfil that purpose, which it is the duty of the sovereign power of the state to accomplish: but they are laws (in the words of Hooker) the matter of which is anything that reason *but probably* teaches to be fit and convenient.[b] They are not immutable or Natural Laws. So there may be a fair difference of opinion among statesmen, whether a Monarchy or a Republic be the most advantageous form of government; or whether a particular system of laws affecting agriculture and commerce be beneficial to the community or no: and the right solution of those questions may be different in each country, and vary according to the change of circumstances.

These laws must be distinguished from those natural immutable laws which ought to be observed in the government of every state, and are direct consequences of the two primary laws. Thus, it is an immutable Natural Law that the burthen of taxation be as equally distributed as may be among the subjects or citizens of the state. This law springs from the institution of property. Thus, in *Entick* v. *Carrington*, 19 Howell, St. Tri. 1066, Lord Camden said, "The great end for which men entered into society was to secure their property.

[a] Vattel, Droit des Gens. liv. i., ch. iii., § 29.
[b] Hooker, Eccles. Polity, b. i., § 10.

That right is preserved sacred and inviolable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, &c., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good."

It follows that no man ought to be made to give up any part of his property beyond what the public good requires. And so, where, for the promotion of some object or undertaking of public utility, such as a dock or a railway, the legislature interferes with private property, the private interest of the individual ought not to be affected to a greater extent than is necessary to secure an object of adequate importance.[a]

Thus, political and immutable laws are to be conjoined together for the good government of mankind, though the reasons on which they are grounded are distinct.

The reasons of immutable laws, and of positive laws designed to carry immutable laws into effect, may be called legal reasons. Here I mean, by immutable laws, both the rules of the law of nature (the *jus gentium* of the ancients), and also that part of Municipal Law which confirms and sanctions them. This explanation will suggest what the positive laws are which are intended to carry into effect those of the former description. They arise (as I explained in my first Reading) from the necessity of regulating certain difficulties which arise in the application of the immutable laws, when the said difficulties are such as cannot be provided against but by laws, and when immutable laws do not regulate them.[b]

Thus, for instance, a positive law, determining the age of majority, is necessary for the application of the immutable law which requires that persons who have not reached a sufficient maturity of reason and experience, should not have the full control of their property. And so, whenever the Natural Law is not sufficiently definite for practical purposes, and a line must be drawn somewhere, this must be done by positive law. Thus, many Municipal Laws, confirmatory of the rules of Natural Law, partake of the nature of both positive and immutable laws, and are, as Domat observes, two laws in one—that is to say, a natural rule confirmed by Municipal Law, and a positive rule created by Municipal Law to define what is indefinite in the former.

[a] Lord Eldon, *Blakemore* v. *The Glamorganshire Canal Navigation Company*, 1 Mylne & Keen, 162; 1 Black. Com., 139; 1 Stephen, Com., 154, 133, 134; *Simpson* v. *Lord Howden*, 1 Keen, 598, 599; *Lister* v. *Lobley*, 7 Adol. & Ell. 124.

[b] Domat, L. Civ., Traité des Loix, ch. xi., § 6.

This class of positive laws are partly framed on reasons of utility or policy, because those rules of natural justice which require to be defined must be defined in the manner most beneficial to the community; but still their primary object is the completion of that body of rules which constitutes the jurisprudence of the country. They are properly subservient to the laws confirming rules of natural justice, to which they are a complement; and they are therefore founded mainly on the same reasons, otherwise they would subvert or impair those rules.

Both these two sorts of Municipal Laws are therefore grounded (those confirming natural rules entirely—and the other kind mainly—) upon what are properly called legal reasons, as contradistinguished from politic reasons.

These laws, or rules of law, form in every civilized community an infinite and complex system, regulating the rights and duties of man with regard to himself, the relations between man and man, and the duties of man arising from such relations: first, as a human creature simply; secondly, as a human creature who has entered into engagements with others; and thirdly, as a member of the community to which he belongs, and a subject of the sovereign power, or as a subject (in a qualified manner) of the sovereign power in community in which he lives as a stranger. Such is the division of the duties of a man and a citizen, as prescribed by Natural Law, which Pufendorf has adopted in his celebrated treatise *De Officio Hominis et Civis*. The obligations comprised in this great plan are, in each country, chiefly defined and regulated (so far as they regard the exterior actions of men) by Municipal Laws, or rules and doctrines of Municipal Law, confirmatory of the law of nature; or by their complimentary, arbitrary laws or rules of law. And the reasons on which both are founded, in all their vast detail, constitute the science of municipal jurisprudence, properly so called.

I say municipal jurisprudence to distinguish it from general jurisprudence, which includes the former, and is the science of the legal obligations of man, independently of the Municipal Laws of any particular country. Its use is to show the plan and system of laws, human and Divine, and the principles on which all human laws ought to be made; with such variations and modifications as the circumstances of the particular community require.

This is the science of which Ulpian speaks—*Jurisprudentia est Divinarum atque humanarum rerum notitia: justi atque injusti scientia.* Cujacius says, in commenting on this law, that jurisprudence investigates things human and Divine, for the purpose of distinguishing between justice and injustice, and is that wisdom which consists in the knowledge of justice and injustice, with reference to things human

and Divine.[a] The great commentator mentions things Divine as well as human; and here we find the connection and analogy of his doctrine with that of Domat, who, in accordance with the Gospel, derives all law—first from duty to God, and in the second place from duty to man.

One of the duties of a citizen by Natural and Divine Law is, as Covarruvias lays it down, obedience to the Municipal Law considered as such, and whether it be positive or confirmatory of the Natural Law.[b]

This is the link which unites positive Municipal Laws to Natural Law and to the two primary laws.

Human society cannot indeed exist without such obedience to positive laws, and therefore it is an obligation of *secondary* Natural Law, which, as Grotius teaches, is that Natural Law which presupposes and springs out of some human institution, such as the institution of property.[c] Thus, presupposing the existence of a positive Municipal Law, the obligation to obey it arises *jure naturæ*. But the obligatory force of Municipal Laws, confirmatory of Natural Law, springs from the Natural Law itself, as well as from the duty of obedience to the sovereign power of the state. That Natural Law may be—primary, such as that which forbids injuries to the person of others—or secondary, such as the Natural Law which protects property.

There are, no doubt, limits to this duty of obedience to Municipal Law. Mr. Justice Coleridge, in his note to 1 Black. Com. 58, while he holds that obedience to the just laws of our country merely as such is a moral duty, lays it down that if the laws of God and of man are at variance, the former are to be obeyed in derogation to the latter, because the source of the most binding authority which human laws have, is the power of the lawgiver derived from God; and that power is clearly abused and misapplied whenever it exerts itself in opposition to the laws of God. This is the doctrine of all the great writers of the Civil and Canon Law. But the first presumption ought to be against the existence of that abuse of power. And the learned judge concludes, that disobedience is always presumptively wrong; though it may be justifiable in the one case supposed, of a contradiction between Divine and human laws, but that it stands in all cases upon the serious responsibility of the party disobeying.

No man can be justified for doing an act forbidden, or omitting an act commanded by Divine Law, on the plea of obedience to human law; but it is in general required for the public good

[a] Lib. x., § 2, ff. De Just. et Jur.; Cujac. Op., tom. vii., col. 54; Intit. Dig. De Just. et Jur., edit. Venet. Mutin.

[b] Covarruv. Op., tom. i., p. 199; De Matrim. cap. vii., § 7, num. 13, 14.

[c] Grot. Dr. de la G., liv. i., ch. i., § 10.

that every man should submit to the letter of an unjust law, saving his right to procure its repeal or amendment according to the public law of his country.

On this principle Paulus says, *Prætor quoque jus reddere dicitur etiam cum inique decernit.*[a] The unjust sentence of the Prætor has still force of law, for, as Cujacius says, *Hoc enim publice interest.* It is required for the welfare of the community that judicial sentences be upheld,[b] unless set aside on appeal. So Ulpian says, without any limitation, *Res judicata pro veritate accipitur.* In case of error, there is no remedy except the legal one of appeal to correct the judgment of the court below, and even then an unjust or erroneous judgment may be given; for, as Ulpian says, even good judgments are reversed by appeal. *Appellandi usus. . . . . Sæpe bene latas sententias in pejus reformat.*[c] But the judgment given in the last resort must be submitted to, though it be unjust.

This principle of obedience to unjust laws and unjust judgments, and decrees of competent tribunals, affords an instance of the connection between arbitrary laws and the immutable law of nature, springing from the two primary laws of duty to God and to our neighbour.

That immutable law, requiring of man the performance of the obligations of social life, one of which is the duty of obeying the sovereign power and the civil magistrate; it follows that that duty attaches wherever it is not annulled by the higher obligation of obedience to the Divine law.

And, without such obedience to the sovereign power and the civil magistrate, the social state could not exist, which would be contrary to the Divine will. In this sense it is that Suarez, Covarruvias, Grotius, Pufendorf, and all the greatest civilians and jurists, hold[d] that the political power of government, or the sovereign power of the state, which, according to different forms of polity, is distributed in various ways, and exercised by divers magistrates, aggregate bodies, and officers, some supreme and some subordinate, some legislative, some executive, some judicial, and some simply ministerial,—is of Divine right.

We come now to consider the *reasons* on which positive laws are founded, having sufficiently examined their obligatory force. The general reason of these laws is utility. And so Cujacius says that *utility engendered Civil Laws*, meaning thereby laws not (as Gajus

[a] Lil. xi., ff. De Justit. et Jur.; lib. lxv., § 2, ff. Ad Senat. Trebell.

[b] Cujac. Op., tom. vii., fol. 9, edit. Venet. Mutin.

[c] Lib. i., ff. De Appellat.

[d] Suarez, De Legib., lib. iii., cap. iv., § 5; Covarruv., Op., tom. i., p. 199; Anaclet Reinffestuel, Jus Canon., lib. i., tit. ii., p. 62; Grot. Dr. de la G., lib. i., ch. iii., §§ 6, 7; Pufend. Dr. des Gens, lib. vii., ch. iii., § 2.

distinguishes) common to all men, or at least obligatory on all men; but positive and peculiar to the particular country.[a] So Cujacius says, *Nec ulla unquam fuit lex civilis æterna, nulla diffusa in omnes gentes.* The equity of these laws consists in their utility, as the great commentator expressly teaches, and in the particular advantage that is found by enacting them according as the times and places may require. The knowledge of this particular sort of equity arising from utility is within the province of the science of politics. This utility, or public policy, or convenience, is indeed a ground on which judges decide where the law is doubtful. So we find this maxim, in Co. Litt. 66. a., *Non solum quod licet sed quod conveniens est considerandum.* And, in *Lawton* v. *Lawton*, 3 Atk. 16, Lord Hardwicke said, "Reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion." And Littleton himself frequently resorts to this legal argument.[b] But he sometimes uses the argument of inconvenience in another sense,—importing either a repugnancy to moral fitness or legal equity, or an inconsistency with some rule of positive law.[c]

Of the same nature is the reason of that exceptional sort of law which is called, in the Pandects, *jus singulare.* It is defined by Paulus to be, *Jus quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est.* (Lib. xvi. ff. De Legib.) And Savigny describes it as purely positive law most commonly created by the will of the legislator, and sometimes belonging to ancient national usages. It is established on a principle of utility foreign to jurisprudence.[d]

A knowledge of the reasons on which positive laws are grounded, that is to say, the public policy,—the objects of utility, which are their end, is a necessary part of the science of Municipal Law. And here we see the link between the science of law and the science of politics, which investigates, among other things, the adaptation of Municipal Laws to their end; that is to say, their relation to the order of the community for which they are intended, with reference to all the objects which that order ought to fulfil. This is what Montesquieu calls the spirit of laws.[e] It is also a necessary part of the science of legis-

[a] Cujac. *ubi supra*, lib. ix., ff. De Just. et Jur.; Domat, L. Civ., Traité des Loix, ch. xi., § 20.

[b] Litt., sections 138, 139, 231.

[c] See instances of the former class in sects. 87, 269, 434, 440, 478, 665; and examples of the latter class in sects. 722, 730.

[d] Savigny, Traité de Dr. Rom., vol. i., pp. 59, 60, 61, 62. Paris, 1840.

[e] Montes. Espr. des L., liv. i., ch. iii.

lation, which may be defined to be the knowledge of the principles whereby good laws are made.

The particular reasons of positive Municipal Laws are as various as the innumerable requirements of society and objects of government; but all are, or ought to be, subservient to the principle of utility, within the bounds of the rules of immutable Law, derived as consequences from the two primary laws.

Many of these positive laws however are, in every country attributable to reasons purely historical, and to what, for want of a more correct term, is called accident. They have been enacted through the power of some individual or party,—perhaps for a temporary purpose, or with a view to some confined object; or their purpose is lost in antiquity; or they have been made such as they are by chance—that is to say, by the operation of some unknown cause or causes, which is very likely to occur where laws are made by popular assemblies. The reasons, or the causes of this sort of laws, or their want of reasons, are matters not legal but historical. To these last-mentioned laws Lord Mansfield and the Roman Julian referred when they condemned the practice of always finding a reason for a law. Their reason is accident, or carelessness, or unskilfulness. They are matter of history, simply as facts.

But as, according to Gajus,[a] all countries are governed partly by laws common to all mankind, and partly by their own peculiar laws; so every country has in each succeeding age been governed partly by laws peculiar to that age, and partly by laws common to the whole history of that country. In different times different causes operate to engender laws, either altogether new or altering or developing those already existing. The knowledge of this progress of legislation from century to century is the science of legal history,—and it shows the historical reasons of positive laws,—as well as the destinies of immutable Natural Law, which is sometimes more and sometimes less well enforced by Municipal Law, according as knowledge or ignorance, religion or evil, have obtained greater or less relative power. The true spirit of positive laws cannot be understood without a knowledge of their historical reasons. Those reasons are sometimes merely historical—that is to say, mere facts, having no relation to public utility. In other cases they are political reasons—that is to say, reasons which show a relation between the law and the order and interests of the commonwealth. But, generally, the reasons of positive laws are both historical and political.

The reasons of one class of positive laws must here be particularly noticed. It consists of laws which have arisen from necessity or a

[a] Lib. ix., ff. De Just. et Jur.

political inconvenience. Of this Pomponius gives an instance, where he says that the difficulty of bringing together, and the inconvenience resulting from the legislative assemblies of the whole people, necessarily threw the care of the republic into the hands of the senate; and, hence came the species of law called *Senatus consultum.*

Thus Modestinus, enumerating the sources of law, says: *Omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo;* a position which Cujacius informs us is derived from Menander.[a] The law which *consensus fecit* was the written law: that which *firmavit consuetudo* was the unwritten or customary law,—and *jus quod necessitas constituit* was *Senatus consultum*, or the decree of the Senate.

This species of political necessity is the principle which has engendered many laws and institutions in every civilized country. One example out of our own history will suffice. The inconvenience of assembling in parliament the lesser tenants in capite caused them to elect representatives. Hence arose the parliamentary representation of counties by knights of the shire. And, indeed, the very institution of the parliamentary and municipal representation of large bodies of citizens who could not, without the utmost inconvenience, deliberate or decide in person, arises from this principle of political necessity:—*jus quod necessitas constituit.*

The reason of this class of laws is pointed out by the very causes whereby they are produced, and the purposes for which they are intended. Those causes are a material part of the philosophy of history as well as of law, and serve to explain many of the greatest changes and transitions in the gradual development of laws and political institutions. They have various forms, as they belong to different classes of laws and customs; and they vary in the degree of political necessity which is their essence: but they are all reducible to the one principle recorded by Menander, Pomponius, and Modestinus; and may equally be called *jus quod necessitas constituit.*

This is one of the outward apparent means whereby human affairs are directed by Divine Providence, and thus we find that the dispersion of mankind and the foundation of separate nations were hastened by the creation of a cause of this kind at Babel. And to the same general principle may partly be traced the first origin of the various institutions enumerated and referred to *Jus Gentium* by Hermogenianus, as Cujacius intimates and Merillus explains.[b] And to this principle

[a] Lib. ii., § 9, ff. De Orig. Juris.; lib. xl., ff. De Legib.; Cujac. Op., tom. iii., col. 373, Observ. et Emend., lib. xiv., ch. xvi.; and see note (*q*) to Savigny, Tr. du Dr. Rom., vol. i., p. 59; Paris, 1840.

[b] Lib. v., ff. De Just. et Jur.; Cujac. Op., tom. iii., col. 373, Observat. et

Ulpian refers in that famous passage in the Pandects where he explains the origin of money.[a]

Here we see a further exemplification of the connection between Natural Law (the *jus gentium* of the ancients) and the science of politics grounded on the principle of utility.

I have now given a sketch of that great subject, the general *reasons of laws*, showing the chief distinctions of those reasons, and the connection and harmony between the science of Municipal Law and the other sciences which regard the order of human society, and the general scheme whereby mankind are governed in the different communities into which they are divided. I have accomplished this task under the guidance of the greatest jurists and practical lawyers of ancient and modern times. But I have not attempted to give more than an outline, which requires to be filled up by study and meditation, though it cannot be useless, even without further investigation, to those who are capable of comprehensive views, and of using classifications, and fundamental doctrines in the cultivation of practical knowledge.

Emend., lib. xiv., cap. xvi. And see Instit., lib. i., tit. ii., § i.; Merilli Variant. ad Cujac., cap. i.; Cujac. Op., tom. iii.

[a] Origo emendi vendendique a permutationibus cæpit: olim enim non erat nummus: neque aliud *merx*, aliud *pretium* vocabatur: sed unusquisque secundum necessitatem temporum, ac rerum, utilibus inutilia permutabat: quando plerumque evenit, ut quod alteri superest, alteri desit. Sed quia non semper nec facile concurrebat, ut cum tu haberes, quod ego desiderarem, invicem haberem quod tu accipere velles, electa materia est, cujus publica ac perpetua estimatio difficultatibus permutationum, æquilitate quantitatis subvenirit: eaque materia forma publica percussa, usum, dominiumque non tam ex substantia præbet, quam ex quantitate, nec ultra *merx* utrumque, sed alterum *pretium* vocatur. Lib. i., ff. De Contrahenda Empt.

ELEVENTH READING.

(*Trinity Term*, 1850.)

A SKETCH OF PUBLIC LAW, AND ON THE NATURE AND ORIGIN OF PENAL LAW.

THE subject of this reading is that part of public jurisprudence which relates to the nature and origin of Criminal Law, so far as it regards not the defining and classifying of offences, but the right of punishment itself.

This belongs to public jurisprudence, according to the celebrated definition of Justinian, in his Institutes, book i. tit. i.

After defining jurisprudence to be the knowledge of things human and Divine, and the science of justice and injustice, he lays down three precepts of law,—*honeste vivere; alterum non lædere, suum cuique tribuere.* These are three immediate applications and consequences of the two great primary laws to which I have often referred. They constitute, indeed, the sum of the practice of the second of those two laws, comprising our duty to our neighbour; and show a remarkable agreement between the legal philosophers of antiquity, from whom they are derived, and the precepts of Christianity.

Justinian next, in the words of Ulpian, divides law into public and private: *Publicum jus est quod ad statum rei Romanæ spectat: privatum quod ad singulorum utilitatem.*[a] And Ulpian explains this passage by saying, that some things (in the law) have for their object public, and others private utility. He divides law into public and private, with reference to its direct and immediate object. The welfare of the community is or ought to be the end of all municipal laws: but some are immediately directed to that end, while others have for their immediate object the regulation of the interests and rights of individuals considered as such. Of the former sort are the laws which appoint the duties of magistrates and officers of government, and of the latter those which regulate the contracts and dealings of private persons one with the other.[b]

[a] L. i., § 2, ff. De Just et Jur. And see Savigny, Traité de Droit Rom., vol. i., ch. ii., § 9 (Trad. par Guenoux, Paris, 1840). Bracton, Lib. i., c. i., §§ 2, 3.

[b] Cujac., in tit. Dig. De Just et Jur., Ad., lib. i., §, *Hujus Studii*, Cujac. Op., tom. vii., col. 15; Donelli Comment. tom. i., lib. ii., cc. 5, 6.

Domat, in the preface to his treatise on Public Law, explains this distinction as follows:—

"With respect to that part of the order of society which is confined to persons united in one state, under one government, the matters arising from this order are of two sorts, which must be distinguished from each other. The first is of the matters which regard the general order of the state, such as those relating to the government, the authority of the sovereign, the obedience due to the sovereign, the force necessary for the preservation of the public peace, the management of the revenue, the administration of justice, the punishment of crimes, the functions of the various kinds of offices, employments, and professions which the public service requires; the general policy touching the use of the seas, of rivers, of the highways, of mines, of forests, of game and fisheries, the government of towns and other places, the distinctions of the different degrees of persons, and other matters of like nature.

"The other sort of matters of this part of the order of society in every state, is of those which relate to transactions between private persons, their engagements, whether by contracts and agreements, such as sales, exchanges, and the like; or without contracts, such as guardianships, succession to inheritance, entails, settlements, and others.

"The former sort of matters have relation to the general order of the state, and belong to public law: and those of the second kind regarding only what passes among private persons, are the matters of the other kind of law, which for that reason is called private law."

The municipal laws of all countries are distinguishable into these two general classes, or heads, of *public law* and *private law*, according as they regulate matters regarding the general order of the state, or the transactions and dealings of private persons, or of persons considered as such.

To the former as well as to the latter the celebrated law of Gajus applies, in which he says, that all nations are governed partly by laws common to all mankind, and partly by laws peculiar to each.[a] And he explains that the law which each nation constitutes for itself is the proper law of the particular country, and is called *jus civile*, which may be correctly translated into the words *Municipal Law:* but that law which is, by the principles of nature, binding everywhere (*quod naturalis ratio inter omnes homines constituit*), is (or ought to be) observed among all mankind.

The distinction between these two sorts of laws, the relation which they bear to each other, and the province appertaining to each in the government of men, have already been explained by me.

[a] L. ix., ff. De Just et Jur.

It is only necessary to add here, that the law which the modern jurists denominate Natural Law, or the law of nature, was called *jus gentium* as well as *naturale jus* by the ancients. But Ulpian in one place[a] uses the term *jus naturale* in a very different sense, for he says that it is that law which nature has taught to all animals.

Voet learnedly explains the origin of this notion.[b] He observes that a sort of shadow or similitude of law may be seen in brute animals, inasmuch as they obey certain instincts, and thereby in many instances (such as the care of their offspring) do that through their nature which the reason of man points out to him as obligatory. And so Cicero, in his 3rd book De Natura Deorum, by a bold flight of oratory, attributes to ants sense and mind, reason and memory, and suggests that they may be held superior to the city of Rome, which seemed deficient in sense.

But Grotius teaches us that this distinction between the supposed law common to all animals and the law of nature, is of no use, because man is the only animal capable of comprehending general rules of conduct, and of being bound by law and obligation.[c] These things, however, are necessary to be known for the comprehension of the classical writers of the Civil Law.

The principles which I propounded in my first Reading, respecting arbitrary and immutable laws, apply to public law as well as to private law, because those principles are essential to the nature of all municipal laws. This is easily proved, for all the laws which regard the conduct of men among themselves are the rules of the social state or society in which God has placed them. Those laws differ according to their relation to the order of society, and whatever be their object with regard to that order they must be either necessary consequences of the two primary laws containing our duty to God and to our neighbour, or not such necessary consequences. Therefore they must be either immutable or arbitrary; and the relation of these two classes of laws to each other must be governed by certain general principles.

And so Hermogenianus, enumerating some of the matters equally appertaining to *jus gentium*, or Natural Law, mentions not only dealings,

[a] L. i., §§ 3, 4, ff. De Just. et Jur. The tripartite division adopted by Ulpian (*jus naturale, gentium, aut civile,*) is an individual doctrine; while that of Gajus (*jus gentium, jus civile,*) is the principle or doctrine of the Roman Law. Savigny, Tr. de Dr., Rom. vol. i., p. 412 (Append). Paris, 1140.

[b] Voet, Com. ad Pand., lib. i., tit. i., § 12. And see Savigny, Tr. de Dr. Rom., vol. i., p. 408 (Append.) Paris, 1840. He says, "Ce n'est pas nullement le droit que les jurisconsultes Romains attribuent aux animaux, mais la matière du droit, le rapport natural qui lui sert de base," p. 409.

[c] Grot. Dr. de la G., liv. i., ch. i., § 11. And see Barbeyrac's notes.

contracts, and obligations between individuals—which belong to private law—but also the formation of nations and the institution of governments.[a]

Domat defines that part of Municipal Law called public law to be a system of rules which regard the general order of government and the polity of a state.[b] And he lays it down that all the rules of public law are built on the necessity and use of that general order.

The purpose or design of God, in linking men together in the social state, to unite them by the spirit of the two primary laws, necessarily implies a subordination among them, or a subjection to authority, whereby some are placed over the others. That authority is what Grotius calls the *civil power*, or the moral power of governing a state, which he thus analyzes.[c]

Whoever governs the state (whether a single person or an assembly) does so either directly by himself, or by means of others. The first sort of exercise of power regulates either general matters or particular matters. The regulation of *general matters* is by making rules called laws, or abrogating them. The settlement of *particular matters* is by the exercise of the executive, or the judicial functions. The second sort of exercise of power, which is carried on by the governing authority by means of others, is that which is entrusted to subordinate magistrates and officers of different grades, and invested with different powers. And this in all countries is the way in which the greater part of the executive and judicial functions are performed.

This doctrine of Grotius clearly implies a subordination of persons. Each society forms a body politic, of which every individual composing it is a member, and as the body is formed of divers members, so there is a subordination, not only of all the members under that person or those persons who is or are the head, but also of the members among themselves, according as the functions of the one depend on the functions of the others.

"Thus," as Domat says, "seeing that the body of each society is composed of a vast number of different conditions of persons and professions, necessary for the common good, it is essential to the society that there be a general subordination of all the conditions and professions under one power, whereby the order thereof is maintained; and that the conditions and professions be subordinated one to the other, according as their functions depend upon each other, or have relation one to the other. And the necessity of this order involves the necessity of government, especially in the condition in which

[a] L. v., ff. De Just et Jur.
[b] Domat, Droit. Publ. Pref.
[c] Grot. Dr. de la G., liv. i., ch. iii., § 6.

mankind are, under so strong a bias to self-love to serve their individual interests, and to gratify their passions; which would overthrow the order of society, if the authority of the government did not restrain them, by inflicting punishment on those who disturb that order."[a]

The division of mankind into distinct communities, called nations, states, kingdoms, or countries, is one of that class of laws the nature of which I have explained in a former Reading, and which is called by the civilians *jus necessarium*, or, in the words of Modestinus, *jus quod necessitas constituit*.[b] It arose out of the nature of things and the exigencies of mankind, though hastened in its first commencement by a peculiar dispensation. The social state could not exist without government, and government could not—after the human race had become very numerous and spread over the face of the earth—be maintained without such division of the human family. And thus Hermogenianus attributes the division of nations and the foundation of kingdoms to the *jus gentium*, or Natural Law:—*Ex hoc jure gentium. . . . . discretæ gentes: regna condita.*[c] Hermogenianus here mentions, first, the division of mankind into nations, and then the institution of governments; showing the former to have been necessary for the latter, and that both spring from the same source—the law of nature —which he, after the manner of his time, calls *jus gentium*.

These general reflections show that in that branch of universal jurisprudence called *public law*, there are natural immutable laws. They are those laws which are so essential to the order of society, that it cannot exist without them, or it cannot so exist as to fulfil the purposes for which it was commanded by the Divine Author of Natural Law. Such is that principle of subordination of which Domat speaks, and wherefrom many consequences flow essential to every form of civil polity. So Suarez deduces the power of making human laws from Divine institution, a position which he establishes with abundant erudition and argument.[d] That function of legislation, or of prescribing general permanent rules for the conduct of the members of a community is the highest attribute of the sovereign power, and necessary in every form of government. And natural jurisprudence itself points out that the conduct of man must be governed by general rules or laws.

Of the same nature is the institution of property, without which either society must be dissolved in a general scramble for such things as are desirable, and the right of the strongest become the only rule; or industry and frugality, the progress of art, agriculture, commerce,

[a] Domat, Droit. Publ., Pref.
[b] L. xl., ff. De Legib.; L. ii., § 9. ff. De Orig. Jur.
[c] L. v., ff. De Just. et Jur.
[d] Suarez, De Legib., lib. iii., cap. iii.

and manufactures must be extinguished or arrested. And thus the things of this earth would soon become insufficient for the wants of man, so that all would be overwhelmed in one common barbarism and poverty.[a] Hermogenianus therefore says, *ex hoc jure gentium . . . . . dominia distincta; agris termini positi; ædificia collocata: commercium, emptiones, venditiones, locationes, conductiones, obligationes institutæ.*[b] But after this enumeration he adds, "*except such things as have been introduced by the Civil Law.*" By this limitation he refers to the distinction which we find in Gajus, between the *jus gentium* common to all men, and the *jus proprium ipsius civitatis*, or Civil Law.[c] For though those things enumerated by Hermogineanus are so necessary in all commonwealths as to be common to all mankind, and everywhere of the same legal nature, and pointed out to man by natural reason, yet they are partly regulated by positive laws, which differ according to the views of legislators and the requirements of time and place in each country.

And so, though the institution of property is of Natural Law, and, from its direct bearing on the public order of the community, it is matter of public law, yet its modifications with reference to the rights, and transactions, and interests of individuals, as such, belong to private law. And the laws governing those modifications are either immutable or positive laws, according as they are or are not necessary consequences of the two primary laws, and therefore are or are not essential to the order of society.

Thus Justinian commences the second book of his Institutes by classifying things considered as property. Some things, he says, are common to all mankind by Natural Law, some are public, some belong to bodies politic (within the state), some belong to no one, and many are appropriated to individuals.

Justinian here assumes the institution of the law of property. He shows that some things, such as air, and light, and the sea, are not appropriated, but remain by Natural Law common to all men. He then proceeds to things public, or devoted to the public uses of the community, such as navigable rivers and ports. The next class of things consists of things belonging to cities and towns, or other bodies politic, called in the Civil Law *universitates*; such, for instance, as the theatres, public baths and places, and public fields.[d] The next

[a] M'Culloch, Princip. of Polit. Economy, ch. ii., § 2, pp. 82, 90, 2nd edit.

[b] L. v., ff. De Just. et Jur.

[c] L. ix., ff. De Just. et Jur.

[d] Those bodies are sometimes called by the canonists *imperfect*, as contradistinguished from those which possess all that is requisite to attain their end, such as sovereign communities and the universal church. Durand de Malliane, Instit. du Droit Can., liv. i., tit. ii., pp. 52, 53.

class consists of *res nullius*—that is to say, things *divini juris*, or sacred, which by the Civil Law are held to belong to no one. And the last class includes what may be called private property—that is to say, *res singulorum*.

These five classes of things are distinguished from each other by the application of the principle of Natural Law, that things on earth are devoted to the use of man according to their respective nature and the purposes which they are intended to fulfil.

The four first are matter of public law; and the last, *res singulorum*, belongs to private law. And in all of them rules of Natural Law are intermingled with a multitude of regulations of arbitrary law, required either to define and carry into practical effect the Natural Law, or to govern divers artificial and arbitrary institutions, having some relation to the order of the community in which they are established.

I have now shown the nature of public law, the analogy between public and private law, and the relation which those two branches of jurisprudence bear to each other.

This sketch of fundamental distinctions and principles will enable us to see the place, nature, and origin of that portion of public law which regards the right of punishing and the exercise of that right.

In a former Reading I explained, that by the Civil Law obligations are divided into four classes, all of which spring from the law, either mediately or immediately. Obligations are thus defined by Justinian, in his Institutes, at the commencement of tit. xiv. of the 3rd book:—*Obligatio est vinculum juris quo necessitate adstringimur alicujus rei solvendæ secundum civitatis nostræ jura.* This definition, as a whole, is confined to civil obligations—that is to say, obligations arising from Municipal Law. But it applies to all obligations, so far that the *vinculum juris*, or bond of law, is essential to the nature of all obligations.

Obligations differ from each other according to the different nature of the law from whence they derive their *vinculum* or obligatory force. Thus, for instance, an obligation deriving its force from Natural Law is called a natural obligation; and one deriving its force from Municipal Law, is called a civil obligation; and some obligations are both natural and civil. We have now to treat concerning civil obligations.

The four classes into which obligations are divided by the Roman Law are these:—Obligations are either *ex contractu*, or *quasi ex contractu*, or *ex malificio*, or *quasi ex malificio*.[a]

The first, are by consent of the party: the second (incorrectly called

[a] Instit., lib. iii., tit. xiv., § 2. And see the Comment by Vinnius thereon.

by Trebonian obligations *quasi ex contractu*), are not by consent, but arise from the law on the occasion of some act not a breach of the law. The two remaining classes spring from the law on the occasion of an act which is at variance with the law—that is to say, a wrong. We are here concerned only with the third class,—obligations *ex delicto* or *ex maleficio*—that is to say, from a crime or misdemeanor, which is a wilful act in violation of the law.

Two legal consequences, or one of them, follow from every *maleficium* or *delictum*. The first is the obligation binding the offender to make restitution or reparation to the person injured by the offence. This is an obligation of Natural law springing from the precepts *alterum non lædere*, and *suum cuique tribuere;* and it is, or ought to be, confirmed and enforced by Municipal Law. The second consequence is, that obligation which is the counterpart of the right to inflict punishment on offenders. This arises from Municipal Law.

Concerning the existence and nature of the obligation of submitting to legal punishment there is some difference among the learned. That question which, in its widest import, is one more of ethics than of law, is fully and well discussed by Pufendorf, in his Treatise of the Law of Nations, book viii. chap. iii. §§ 4, 5. But we have to consider it here on purely legal principles. Pufendorf correctly determines (§ 5) that there is no consent of the party from which the right of punishment can be derived, for laws are not contracts. And he holds that there is no legal obligation, strictly speaking, which compels an offender to undergo punishment. Thus he lays it down, that an offender may, without violating any obligation, deny his guilt, or escape from justice; and that it is unjust to examine the prisoner on oath. He might have added, according to the wise provision of our law, that he ought not to be examined at all.

But, as Pufendorf admits, and his learned annotator, Barbeyrac, urges, every right must have a correlative obligation. This is an axiom of jurisprudence. Thus, if A. has a right to punish B., there must be an obligation on the part of B. to submit to punishment, for there cannot be two conflicting and inconsistent rights. That obligation attaches in the strictest sense in the case of pecuniary penalties. But with respect to punishments *in personam*, especially of a severe character, it is somewhat different. And Barbeyrac holds, with regard to these, that the offender is not bound to offer himself for punishment, nor to plead guilty; but that he is bound not to resist the law, and also to undergo punishment without complaining. On these principles, by the Common Law (as Lord Hale lays it down, in the first part of his Pleas of the Crown, chap. liv.), breaking prison by one imprisoned for misdemeanor is a felony. But if the gaoler sets open

the prison doors, and a felon escapes, this may be felony in the gaoler; but it is no breach of prison to make it a felony by the prisoner. The law makes allowance for the natural instinct of the prisoner. And so no man is punished for not delivering himself up to justice, though his doing so might be a reason for mitigation of his punishment.

We may conclude, that though the law takes into consideration the natural impulse of self-preservation with regard to a certain class of punishments, yet, if there be a right on the part of the State to punish offences, there must be a corresponding obligation on the part of the subject to submit to the penal sanction of the laws.

The foundation and nature of that right remain to be explained.

As we have seen, Domat lays it down that from the necessity of the order of society follows the necessity of government; and the selfishness and passions of man would overthrow that order if the authority of the government did not restrain them, by inflicting punishment on those who disturb that order. In accordance with this doctrine, the great Papinian describes Municipal Law as follows:—*Lex est commune præceptum; delictorum . . . . . coercitio; communis reipublicæ sponsio.*[a] And Modestinus says, *Legis virtus hæc est; imperare; vetare; permittere; punire.*[b]

By primary Natural Law alone, without regard to the institution of civil society, there must be, as Grotius shows, a right of punishing violations of the law, though it does not determine in what person that right is vested.[c] Nature herself attaches certain penal consequences to some violations of her laws; and it is impossible to deny that, in what has been called the state of nature, every man has a right to defend his rights; and that whoever commits a crime may be justly punished, for the purpose of deterring him from doing so again, and others from following his bad example. This is a consequence of the natural right of self-defence, which is so broadly laid down by Florentinus in the Pandects,[d] and admitted by our own law.

And from this natural right of persons, having no common superior to protect themselves, not only by defence, but by punishing wrongdoers, the right of war is in part derived. I say in part, because war may have for its object to obtain reparation, in the nature of damages, for an injury, or to recover what has been wrongfully taken, or obtain what is wrongfully withheld.[e] And here we see the analogy between

[a] L. i., ff. De Legib.

[b] L. vii., ff. De Legib.

[c] Grot., Dr. de la G., liv. ii., ch. xx., § 31. Pufend. Dr. des Gens., liv. viii., c. iv., note (Barbeyrac) 3.

[d] L. iii., ff. De Just et Jur. And see L. xlv., § 4, ff. Ad Leg. Aquil., lib. viii., § 2, Quod Metus Causa.

[e] Wheaton, Elem. of Internat. Law, vol. i., ch. i., § 1.

the Law of Nations and the Municipal Law, for both deal with wrongs in two ways, by compelling reparation, and by means of punishment inflicted on wrongdoers.

The right of punishing in the civil state and under the rule of Municipal Law, differs from that which I have just described as existing by primary Natural Law.

A penalty or punishment under Municipal Law is neatly defined by Voet to be—*Delicti coercitio, adeoque malum passionis, propter malum actionis.* It is more fully defined by Boehmerus to be an evil suffered, which is inflicted by the authority of a superior on account of an offence, and for the common benefit of the citizens.[a]

It is inflicted by the authority of a superior, because under Municipal Law the right of punishing offences passes entirely to the State.[b] Thus Paulus says, *Non est singulis concedendum quod per magistratum publice fieri potest.*[c] This passage contains the doctrine that no man is permitted to take the law into his own hands, and to do for himself that which the civil magistrate is instituted by the public Law to do,—provided the civil power be able and ready to maintain his rights.[d] And hence it appears that under Municipal Law no man is justified in using force so as to hurt another, even in self-defence, when he can without risk avoid doing so by calling the aid of the civil power. And the use of violence is strictly limited by Municipal Law within the bounds of necessary self-defence. Paulus says, *Illum qui vim infert ferire conceditur; et hoc si tuendi dumtaxat non ulciscendi factum sit.*[e]

With these principles our own law agrees. Lord Hale defines homicide *se defendendo* to be "the killing of another person in the *necessary* defence of himself against him who assaults him.[f]" And he says that it is regularly necessary that the person that kills another in his own defence fly as far as he may to avoid the violence of the assault before he turn upon his assailant,—because the King and his Laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge of one another.[g]

[a] Voet, Com. ad Pand. tit. De Pœnis, § 1; Boehmer. Elem. Jur. Crim., § 2, c. i.; Pufendorf, Dr. des Gens, liv. viii., ch. iii., § 4. And see Mathæus De Crimin. tit. viii., § 1, p. 754.

[b] Pufendorf, Dr. des Gens, liv. viii., ch. iii., § 4, note 3 (Barbeyrac).

[c] Lib. clvi. ff. De Reg. Jur. And see Lib. xiii., ff. Quod Metus Causa; and Gravina, Histor. de Ort. et Progr. Jur. Civ., c. xci.

[d] Bowyer's Com. on the Modern Civ. Law, p. 278.

[e] Lib. xlv., § 4, ff. Ad Leg. Aquit.

[f] 1 Hale, P. C., ch. xl., p. 479.

[g] 1 Hale, P. C., 481.

We have next to consider the relation of the legal power of punishment to private law and to public law respectively.[a]

Its province in relation to private law is the protection of the private rights of individuals where they are not sufficiently protected by the civil remedies, whereby the rights of dominion, and the obligations arising either from consent and without consent, are protected and enforced. Thus (for example) the right of dominion or ownership would not be sufficiently protected by the civil remedy of restitution in cases of theft. The punishment of the thief must therefore be added to that remedy. So private rights would not be sufficiently protected from violation by means of forged documents, by the mere cancelling of the forged instrument and by restitution. The punishment of the offence of forgery is therefore necessary in addition to the civil remedies.

The province of Criminal Laws and the legal power of punishing is more extensive with relation to public law. We have seen that Domat defines public law to be a system of rules which respect the general order of the government of a state; and he shows that the power of restraining by punishments persons who violate those rules and disturb that order is necessary to the existence of human society. The exigences of human society in highly civilized countries have engendered an infinite variety of those rules, and caused the detail of that order to become very complicated and extensive. Hence that great number of penalties or punishments which we find in the laws of our own and other countries, having for their object to enforce their various enactments. And this aspect of Criminal Law shows why it is a branch of public law. Its fundamental principle is contained in these words of Cujacius, with regard to Civil Law, strictly so called, that is to say, arbitrary Municipal Law: *Utilitas peperit jus civile. Hæc autem utilitas æquitas est, et quidquid Reipub. utile et conducibile est bonum et æquum est.*[b] And so Grotius lays it down that the true object of human punishment is not vengeance, but some utility,—some advantage to be derived from its infliction.[c]

It is not only because the offender morally deserves punishment that he is punished, but he is punished with a view to utility,—in order that the punishment may produce *some useful result.* And so, as Grotius and Pufendorf agree, every punishment ought to have for its

[a] Savigny, Traité de Droit Rom., vol. i., ch. ii., § 9, p. 25 (Traduit par Guenoux, Paris, 1840).

[b] Cujac., Recit. Solemn. Ad Lib. i. Digest. tit. De Just. et Jur. Cujac. Op., tom. vii., col. 9., edit. Venet. Mutin.

[c] Grot. Dr. de la G., liv. ii., c. xx., § 4; Cremani De Jur. Crim., lib. i., pars ii., ch. iv., vol. i., p. 124.

object, the advantage, that is to say, the correction of the offender,—the security of whoever is interested in the offence not being committed,—or the welfare of the community or of mankind in general.[a]

The chief and essential object of all punishments is, according to that great writer on criminal jurisprudence, Cremani, to deter others by example from offending.[b] This is the only object of capital punishments. But all the authorities cited above agree that one great object of Criminal Law is the amendment of the offender. This is called corrective punishment. It is the infliction of some pain with a view to deter the offender from breaking the law again; and it should be accompanied by what Lord Coke calls preventing justice, which he makes partly to consist in religious and moral instruction.[c] Of this corrective character all punishments ought to partake, except the extreme penalty, which operates only by way of deterring persons from crimes by example. Such are the general objects of punishments. But the moral guilt of the offence must not be neglected in determining the degree of severity with which it should be punished.[d] And utility being the object of punishments, severity ought never to be carried beyond what that object demands.

Thus a due proportion should be preserved between the offence and the punishment, having regard as well to the moral wickedness of the former as to the object for which the latter is intended.

[a] Pufendorf, Dr. de l'Homme et du Cit., liv. ii., ch. xiii., §§ 6, 7; Grot. *ubi supra*, §§ 6, 7, 8.

[b] Cremani de Jur. Crim. *ubi supra*, § 8, p. 128.

[c] 3 Inst. Epilogue.

[d] Grot., *ubi supra*, § 28.

TWELFTH READING.

(*Michaelmas Term*, 1850.)

ON THE USES OF THE CANON LAW, AND ITS GENERAL CHARACTERISTICS.

In the commencement of my labours as Reader, I engaged to present to this honourable Society not indeed information which may best be acquired by the perusal of reports and text-books, and by practice and attendance in Court; but learning difficult or impossible to be attained by those means,—yet in many ways valuable, both as an auxiliary to them, and also for the purpose of augmenting and enlarging our English jurisprudence.

I should ill perform that engagement if I did not extend my duties to the exposition of Ecclesiastical Law, so far as a knowledge of that branch of jurisprudence is required for the masterly comprehension of our own law, and the performance of those higher and more extended public duties which the constitution of this country may peradventure cast on some of my hearers.

I must, however, first show what is the value and what are the uses of the Canon Law, with reference to the province of our profession, and the administration of justice within these realms. I express myself in the restricted terms which I have used, because it is my duty here to confine myself scrupulously to legal principles and views, avoiding carefully all that belongs to the higher science of theology, and viewing the Canon Law simply as an exterior system of polity and jurisprudence, which has exercised and still exercises a more or less powerful influence over the temporal governance, institutions, and laws of every Christian country. I shall consider this subject as a lawyer, but still in a liberal and scientific spirit, suitable to the investigation of a branch (and a considerable branch) of the great science of universal jurisprudence. And my object will be to give to my hearers, in four Readings, such a knowledge of the Canon Law as must be valuable to them, having regard to their position as English lawyers. The first part of my task is this—to show you what are the uses and in what consists the value of the Canon Law, considered as a branch of universal jurisprudence, and (though in a restricted and qualified manner) belonging to the jurisprudence of this country.

Savigny observes, that the institutions of the Civil Law have been modified and completed by the Canon Law, which has been recognised as part of the Common Law of Europe, together with the Civil Law.[a] And the same learned writer lays it down as the jurisprudence of Germany, that in matters of private law, where the Civil and the Canon Law differ, the latter has the preference, excepting on points specially provided for by the jurisprudence of the country, and (in Protestant countries) where the particular rule or provision of the Canon Law is opposed to the Protestant doctrines. And he mentions, as a third exception to a general rule, the cases where an Imperial (German) Law, contrary to the rule of the Canon Law, restores the rule of the Civil Law.[b]

The law of marriage affords an instance of the influence of the Canon Law in the formation of the modern jurisprudence of all Christian countries. Lord Stowell, in the celebrated cases of *Dalrymple* v. *Dalrymple*, and *Lindo* v. *Belisario*, shows marriage to be in its origin a contract of Natural Law (as Ulpian says), in civil society a civil contract regulated and prescribed by law, to which in many countries the sanctions of religion are superadded. And in all Catholic, and some Protestant, countries, it is held to be a Sacrament.[c] Our Common Law, as administered in the temporal Courts, considers marriage in no other light than as a civil contract: but still those Courts do not neglect the Canon Law (so far as it is received in this country) where they have to adjudicate on matrimonial questions.[d] And the greater part of the law of marriage is administered by the Ecclesiastical Courts, which proceed according to the practice and principles of the Canon Law, within the limits assigned by our Municipal Law.

These considerations suffice to show that the Canon Law, which is the general Common Law of the Christian church, necessarily exercised a powerful influence over the formation of the law of marriage in all Christian communities, modifying the law of contracts derived from the Civil Law, and adapting it to the doctrines and discipline of that church. Such is the process whereby the European law of marriage

[a] Savigny, Tr. de Dr. Rom. vol. i., p. 74. Paris, 1840. And see on this subject, Duck, De Author. Jur. Civ. lib. i. c. vii, § 11. See an instance in Savigny, Tr. de Droit Rom. vol. iii., p. 109, note (*g*). The liberty of divorces in the Roman Law, rendered unnecessary any disposition regarding marriages contracted by force. The Modern Law, under which divorces became very difficult, made this omission a real defect. The Canon Law fills up that *lacuna* by making such marriages void. And see p. 121, note (*f*).

[b] *Ibid.* p. 260.

[c] 2 Hagg. Consist. Rep. 63; 1 Hagg. Consist. Rep. 231.

[d] *Reg* v. *Millis*, 10 Clk. & Fin.

was generated: and it is material to observe, that that process was carried on, so far as regards all the great features and fundamental rules of this important head of law, at a time when the Catholic Church of Rome was the established and dominant church in all civilized countries.

The learned English civilian, Arthur Duck, writing in the year 1678, shows the great use and authority of the Canon Law in France, Spain, Hungary, Denmark, and even in the Protestant countries of Germany. And he observes, with regard to England, that the greater part of the Decretals in the Corpus Juris Canonici were sent here by the Roman pontiffs, and relate to English causes and other affairs.[a] Erskine says that before the Reformation the Canon Law was at least of as great authority in Scotland as the Roman, and became the law of the land in most articles of private right; though since that event it has declined in its authority, and is now little respected, except in questions of tithes, patronages, and a few more articles of ecclesiastical right.[b] And the Scotch Law adopts that very important doctrine of the Canon Law, that children born illegitimate are legitimated by the subsequent marriage of their parents.[c]

To this sketch of the influence of the Canon Law over the laws of modern nations I need only add, that it has become an essential part of the modern Civil Law, which it has modified and improved, and completed in various ways, as I have shown in my commentaries on that science. Thus, for instance, from the Canon Law is derived the condemnation and nullity of the contract called *Mohatrà* or *Varatra*, consisting in an usurious loan under colour of a sale of goods, which is also void by the English Law, as appears by the cases of *Moore* v. *Battie*, Amb. 371, and *Lowe* v. *Waller*, 2 Dougl. 736. And the law respecting marriages made by force has the same origin.[d]

Let us now see the place that the Canon Law holds in the science of universal jurisprudence.

Domat observes, that laws in general are of two sorts: one concerning religion, and the other relating to temporal polity; and then he proceeds to show this difference between them, confining himself, however, to the laws of countries professing the Christian religion. Municipal laws regarding temporal polity, are framed with reference to the division of mankind into separate nations. But the spirit of the

[a] Duck, De Author. Jur. Civ., lib. i., cap. vii., §§ 15, 16.

[b] Ersk., Instit. b. i., tit. i., § 42.

[c] Ersk., Inst. b. i., tit. vi. § 52. The Decretals, b. iv., tit. xvii. *Qui Filii sint Legitimi*, cap. vi., *Tanta est Vis Matrimonii*.

[d] Reiffenstuel, Jus. Canon., lib. iii., tit. xvii., § 9; num. 298, 299; Savigny, Tr. de Droit Rom. vol. iii. p. 109, note (*g*).

laws of the church, which do not regard temporal polity, is of a more comprehensive and universal nature; for they regard mankind in general with reference to an abstract truth and obedience, as forming a body politic or society.[a]

Thus, the Established Church in this country looks upon itself as one branch of the universal church; and almost every other church or Christian sect has regard to a unity exterior to the limits of the state wherein it exists, considering itself as either the only true church in the world, or at least the most pure from error.[b]

But this extra-municipal or catholic spirit is most strongly exhibited in the Canon Law, from whence the ecclesiastical laws of the Established Church are derived. And, following the profound observation of Savigny, that to obtain a full and philosophical knowledge of any body of law, it must be studied from the same point of view from whence it was seen by its founders, we will examine (though legally and not theologically) this original idea and spirit of the Canon Law.

Domat lays it down that there is but one true religion, which is called catholic—that is to say, universal: that all persons professing it are united in one church under the successor of St. Peter, in whom is vested the spiritual government of the said church, who is the centre of its unity and the common father of the faithful, the members thereof dispersed over the whole world.[c]

So Suarez lays it down, that there is a legislative power inherent in the Catholic Church, as such, and it is therefore not confined to the territorial limits within which municipal laws are made.[d]

This ideal of unity and universality is the spirit of the Canon Law, considered in its general nature, and may be traced through the infinite details of its rules and doctrines.

Let us see this legal system as it may exist within any particular country, and in relation to temporal Municipal Law.

Savigny writes as follows:—"Public Law is also in contact with Ecclesiastical Law. Humanly speaking, the church, considered as a community, as a corporation, might belong to both public and to private law, and be comprised within their domains. But its authority over the interior man rejects such an assimilation. History shows us that the church and its law have, at different times, held a very different place in the state. Among the Romans, the *jus sacrum* was

[a] Domat, Droit Publ., Preface.

[b] Palmer, Treat. on the Church, vol. i., ch. vii. And see the National Covenant (Scotland), or the Confession of Faith, ratified by Parliament, by an Act of 1640, and subscribed by King Charles II.

[c] *Ibid.*

[d] Suarez, De Legibus, lib. iv., cap. i.

part of the public law, and was regulated by the state. Christianity, by reason of its universality, cannot be subjected to a purely national direction or government. The church in the middle ages attempted to raise herself above states, and to exercise domination over them. We must consider the various Christian churches as existing *beside the state*, but having a multitude of points of contact and intimate relations with it. Therefore Ecclesiastical Law is a special body of Law, independent both of public and of private Municipal Law."[a]

It is necessary to observe that this great civilian uses the expression, "the various Christian churches," in a Protestant sense; but his doctrine may be understood in a sense accordant with the Canon Law. He cites the celebrated law of Ulpian, defining public law:—"*Publicum jus in sacris, in sacerdotibus, in magistratibus consistit.*[b] It shows that, with the Romans, the *jus sacrum* was a branch of the municipal public law of the state, which, as he justly observes, could not be with regard to the law of the Christian church.

That law, though not identical with either public or private Municipal Law, bears a certain relation to both. This will appear from a remarkable passage of Domat's celebrated work on Public Law. He lays it down that the state of the society of mankind throughout the world is made to subsist, by Divine providence, by means of three several kinds of ties or bonds of union, which distinguish it into three parts or orders. The first, is that of religion, which is not confined within any particular state. The second, is that of human nature, common to all men. The third, is that which is formed in every state by the order which unites all the families whereof it is composed under one and the same government, whatever religion they may profess.

As these three different orders, or parts of universal society, have their different relations to the common good, and to the different engagements and duties of men; so the subject-matter of their laws, and also their laws themselves, have in the same manner their diversities adapted to their uses.

"The first order," continues the great civilian, "which is that of religion, whether we consider it in the extent given by its spirit, which excludes no one, or in its actual extent over the nations which receive it and which are within the pale of the church, has for the subject-matter of its laws everything relating to the good order of society with respect to Divine worship. This order comprehends the truths of religion, the law which man ought to observe in regard to them, the particular rules of faith and morals—one part whereof relates to the

[a] Savigny, Tr. de Dr. Rom., tom. i., pp. 26, 27, Paris, 1840.
[b] L. i., § 2, ff. De Just. et Jur.

reciprocal duties of sovereigns and subjects, and other matters appertaining to public order: the authority of the church, and the regulations which the apostles, their successors, and the councils have established therein; a great part whereof is preserved by the traditions of ecclesiastical discipline—that is to say the polity of the church. And all these matters have for their laws the ten commandments, the gospel, the doctrine of the apostles, and all the books of the Old and New Testament, the councils, tradition, and the decrees of the popes.

"There is this difference to be observed between matters of faith and morals, and matters of discipline. The latter being subject to change, their rules are also subject to alteration, and may be different according to times and places; whereas the rules of faith and the essential precepts of morals are the same everywhere, and remain always unchangeable, because they are Divine revealed truths. But besides these laws of the church, seeing it has for its government powers whose office is spiritual, and that they are not wont to repress by force and by temporal punishments enforced by external means those who violate its laws, and disturb its order so as to deserve such punishments, Christian princes have reckoned it their duty to protect the laws of the church by their laws, and to inflict temporal punishments on those who transgress the laws of the church, in cases where those punishments ought to be inflicted."[a]

This comprehensive plan of Ecclesiastical Law presents to us, in the first place, the distinction between mutable and immutable laws, which is to be found in this as in every branch of universal jurisprudence. It also shows us the distinction between purely ecclesiastical rules and municipal laws made by the civil power for the purpose of assisting the laws of the church, by giving remedies against those who violate them. So the same learned writer shows, in another place, that there is a necessary connection between the first of the three orders (that of religion) and the third order of human society (that of municipal and civil polity), because there are matters touching the persons and property of the church, which affect and regard the temporal polity and economy of the state and civil society; and therefore the laws regulating them rank among those of both orders.[b] Hence we learn the relation between Ecclesiastical Law and Municipal Temporal Law, both public and private.

The Ecclesiastical Law has for its direct subject-matter (as Suarez

[a] Domat, Dr. Publ. Preface; and see D'Aguesseau, Œuvres, tom. i., p. 279, edit. 1787.

[b] Domat, *ibid.*

learnedly shows)[a] only external acts of men. Hence the common maxim, *Ecclesia non judicat de occultis.* And so Lancelottus, and other great canonists, show in their definitions of the Canon Law, that it is a rule of civil conduct—that is to say, a rule to direct and govern the actions or conduct of the citizens of the commonwealth of which it is the law, that is to say the Church.[b]

Another analogy between Ecclesiastical and Temporal Laws is this, that both may be, directly or indirectly, traced to and hang from the two primary laws which, as Domat demonstrates, are the foundation of all other laws; namely, the duty of man to God and to his neighbour. And, indeed, having regard to the description of the objects to which the laws of the Church are directed, it is clear that they ought to work out the consequences and results of the two primary laws more perfectly than the temporal laws.[c] Thus, for instance, the Canon Law does not allow the privilege of acquiring by prescription to any but a *bonâ fide* possessor, establishing the rule, *Possessor malæ fidei ullo tempore non præscribit.* And Pope Boniface VIII. accordingly lays it down that *Peccatum non dimittitur nisi restituatur ablatum.* But by the Civil Law *bona fides* at the commencement of the possession suffices.[d] And the influence of the Canon Law has in many instances improved the modern Civil Law by discountenancing technicalities, and by introducing more Christian and conscientious principles. Thus, the Canon Law, adopted by the modern civilians in this particular, dispenses with the use of the technical names of different actions in pleading.[e] So it condemned and led to the abolition of the barbarous customs of judicial combat and trial by ordeal. Thus, the Canon Law does not hold that the status of slavery constitutes any incapacity for the valid reception of holy orders, though it forbids such promotion without the consent of the master, who was required to give the slave his freedom.[f] This was a great improvement upon the Civil Law,

[a] Suarez de Legib. lib. iv., cap. xii., xiii.; Decret. Gratian., Tract. De Pœnit. cc. xiv. xxxi. And see Can. et Decr. Concil. Trident. sess. xxiv., Decretum de Reform. Matrim. c. i.

[b] Lancelot. Instit. Jur. Canon., lib. i., tit. i., § 1. See Reiffenstuel, Jus Canon. Proem., § 3. As to Temporal Law, see *Reg* v. *Higgins*, 2 East, 21.

[c] Reiffenst. *ubi supra*, num. 42. And see a remarkable instance, lib. iii., tit. xvii., § 11, num. 329.

[d] Reiffenst. Proem., § 11, num. 1; Bowyer, Comm. on the Mod. Civ. Law, p. 117; Fæbeus De Regul. Jur. Can., tit. iii., reg. 4.

[e] Bowyer, Com. on the Mod. Civ. Law, p. 279.

[f] Can. Apostol., Can. lxxxii., *apud* Van Espen, Op. Omn., tom. vi., p. 381; Decr. Gratian., Distinctio liv.; Decretal., lib. i., tit. xviii., De Servis non Ordinandis; Hericourt, Loix Eccles. pp. 15—75, 76. See, as to the marriage of slaves, Reiffenstuel, Jus Can. Proem., § 10, num. 14.

which allowed to the slave no legal capacity or existence except by mere Natural Law.[a] And there is no doubt that the influence of the Canon Law contributed powerfully to place the status of the slave, or serf, on a footing consistent with Christian morals; and led to the extinction of that lamentable institution which even the Romans acknowledged, as we find in the Pandects, to be contrary to nature.[b]

I do not deny that there are defects in the Canon Law, arising from political causes and the state of knowledge and civilization at particular periods of the history of Europe; but its influence was on the whole very important and beneficial in the development of the science of jurisprudence and the improvement of every branch of law.

Let us see on the purview of this subject the opinion of Wheaton, the American jurist (a Protestant and a republican), in the Introduction to his History of the Law of Nations.

After describing the rise of the school of Bologna, the learned writer continues thus:—"From this period the cultivation of the science of the *jus gentium* was considered as the peculiar office of the civilians throughout Europe, even in those countries which had only partially adopted the Roman jurisprudence as the basis of their own Municipal Law. The authority of the Roman jurisconsults was constantly invoked in all international questions, and was not unfrequently misapplied, as if their decisions constituted laws of universal obligation. The Roman Law infused its spirit into the Ecclesiastical Code of the Roman Church; and it may be considered as a favourable circumstance for the revival of civilization in Europe, that the interests of the priesthood, in whom all the moral power of the age was concentrated, induced them to cherish a certain respect for the rules of justice. The spiritual monarchy of the Roman Pontiffs was founded upon the want of some moral authority to temper the rude disorders of society during the middle ages. The influence of the Papal authority, though sometimes abused, was then felt as a blessing to mankind. It rescued Europe from total barbarism; it afforded the only asylum and shelter from feudal oppression. The compilation of the Canon Law, under the patronage of Pope Gregory IX., contributed to diffuse a knowledge of the rules of justice among the Catholic clergy; while the art of casuistry, invented by them to aid in performing the duties of auricular confession, opened a wide field for speculation, and brought them to the confines of the true science of ethics. The universities of Spain

[a] Lib. xxxii., ff. De Reg. Jur.; Savigny, Traité du Dr. Rom., vol. ii., pp. 29, 30, Paris, 1840. But see the celebrated Law, *Barbarius Philippus*, L. iii., ff. De Officio Prætor., which rests on grounds of Public Law. To it applies the rule in L. xvi., ff. De Legib.

[b] Lib. iv., § 1, ff. De Statu Hom.

and Italy produced, in the sixteenth century, a succession of labourers in this new field."

The same views are professed by Guizot, in his Course of Modern History; and, in his sixth lesson, he shows that the penitential laws of the Church contain the great principle of combining example with the amendment of the offender, on which the reform of criminal legislation has been based, and capital punishments abolished except in a few cases. And the good effects of the Canon Law are thus described by Robertson, in his History of Charles V. (vol. i. sect. 1, c. vi).

"Whatever knowledge of ancient jurisprudence had been preserved, either by tradition or in such books as had escaped the destructive rage of barbarians, was possessed only by the clergy. Upon the maxims of that excellent system, they founded a code of laws consonant to the great principles of equity. Being directed by fixed and known rules, the forms of their courts were ascertained, and their decisions became uniform and consistent." * * * * "Thus the genius and principles of the Canon Law prepared men for approving those three great alterations in the feudal jurisprudence which I have mentioned. But it was not with respect to these points alone that the Canon Law suggested improvements beneficial to society. Many of the regulations, now deemed the barriers of personal security, or the safeguards of private property, are contrary to the spirit of the civil jurisprudence known in Europe during several centuries, and were borrowed from the rules and practice of the Ecclesiastical Courts." (In the note) "Almost all the forms in lay Courts which contribute to establish, and continue to preserve order in judicial proceedings, are borrowed from the Canon Law."

These reflections and authorities show how the temporal Municipal Law and the Ecclesiastical Law, being intimately connected with each other,—both equally flowing from the two great primary laws laid down in the Gospel,—have conjoined together,[a] for the maintenance of human society and the governance of mankind. Both are branches of the great science of universal jurisprudence, which comprises all the regulations of human society, and all the laws to which men should conform their actions. In this sense we may accept the definition of Ulpian: *Jurisprudentia est divinarum atque humanarum rerum notitia: justi atque injusti scientia.*[b]

I have now sufficiently established the general importance and uses

[a] See preamble of Stat. xxiv., Hen. VIII., c. xii.; so far as regards the concurrence of the two powers to one end,—the good government of the community. *Caudrey's Case*, 5 Rep. 7.

[b] Lib. x., § 2, ff. De Just. et Jur.

of the Canon Law, and shown its place in the science of universal jurisprudence.

We have yet to consider it with reference to our own Municipal Law.

The general principle of the relation between the two laws is thus laid down by Lord Hale, in his History of the Common Law, p. 27:— "All the strength that either the papal or imperial laws have obtained in this kingdom is only because they have been received and admitted, either by the consent of Parliament, and so are part of the Statute Law, or else by immemorial custom and usage in some particular cases and Courts, and no otherwise; and therefore, so far as such laws are received and allowed of here, so far they obtain and no farther; and the authority and force they have here is not founded on or derived from themselves, for so they bind no more with us than our laws bind in Rome and Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative essence and qualifies their obligation."

The same principles are laid down by Lord Coke, 2 Inst. 599, 600; Lord Kenyon, 8 Durn. & East, 414; Lord Hardwicke, in *Middleton* v. *Croft*, 2 Atk. 660, 661; and Lord Chief Justice Tindal, in *Reg.* v. *Millis*, 10 Cl. & Fin.

The judges of the Common-law Courts will give faith and credit to the sentence of the Ecclesiastical Courts, or Courts belonging to the Protestant Church established by law, within the limits of their jurisdiction: but the Superior Courts at Westminster have the superintendency over them, to keep them within that jurisdiction, to determine wherein they exceed it, and to restrain and prohibit such excess.[a]

An appeal lies from the Courts of the Established Church to the King in last resort, which, as Blackstone lays it down, proves that the jurisdiction exercised by them is derived solely from the Crown of England, and not from any intrinsic authority of their own; and he concludes that the Canon Law is, with reference to our Municipal Law, *lex sub graviori lege*, and an inferior and subordinate branch of the customary or unwritten Laws of England, properly called *the King's Ecclesiastical Law*.[b]

It is not consistent with the design of these Readings to show what are and what are not matters within the authority of the Canon Law, so far as it is admitted as a branch of our English Law. That is a subject of great extent, and explained with all its details in text-books

[a] *Caudrey's Case*, 5 Rep. 7; 1 Black. Com., Introd. 83.

[b] 1 Black. Com., Introd., § 3, p. 63; *Caudrey's Case*, 5 Rep.; Stat. xxvi., Hen. VIII., c. 1; Stat. i., Eliz. c. 1; Chitty, Prerog. of the Crown, ch. v; Burn, Eccles. L., tit. Courts; Lord Raym. 25.

and reports familiar to every lawyer. I will therefore confine myself to pointing out in a general way the uses of the Canon Law as a part (though subordinate) of the study of law in this country.

I have already shown not only the large space which the Canon Law occupies in the legal history of Europe, and its influence over the progress and development of law, but that it is a considerable and essential branch of the science of universal jurisprudence, bearing a relation both to public and to private law, and therefore necessary for the comprehension of the legal relations of society in the modern civilized world.

I need not say that a knowledge of the Canon Law is requisite for all who practise in the Ecclesiastical Courts, including the Judicial Committee of the Privy Council. They ought to study it systematically as a whole; for, by restricting themselves to such portions as they find in the reports and in books of practice, they must not only give a narrow and servile character to their profession, but be liable to misapply or misunderstand the law, and unable to deal in a masterly manner with new cases or unusual difficulties, in which analogies and principles are required. No one can deserve the name of a civilian who is not also a canonist. The study of those two branches of legal science ought not, for the sake of both, to be separated. The Canon Law freely uses the authority and the equity of the Civil Law, and the Civil Law adopts and follows much of the spirit and many principles of the Canon Law; so that they reciprocally adorn and assist each other.[a] Perhaps the abolition of the study of Canon Law in the two Universities has led more than any other cause to the decline of the knowledge of the Civil Law and of jurisprudence in this country.

A knowledge of the Canon Law is also valuable to that part of the bar who do not practise in the Ecclesiastical Courts,—not only as an important portion of the science of jurisprudence, but because it is of authority in the Courts of Common Law and Equity. Thus it is laid down, in *Rennell* v. *The Bishop of Lincoln*, 3 Bing. 271, 272; 11 Moore, 139; that "where the Ecclesiastical Law does not contravene the Law of England, it is adopted into that law, and is to be followed by the temporal courts in the decision of such cases as are within its influence." The Ecclesiastical Law is for the decision of such questions, and must be taken notice of by the judges of the Courts of Common Law in deciding them.[b]

A bare reference to the indexes and digests of cases—under the heads *Prohibition*, *Ecclesiastical Law*, and others—will show what a multitude of cases occur in which the Canon Law must be resorted to

[a] Duck de Usu et Author. Jur. Civ., lib. i., cap. vii., § 9.

[b] *Edes* v. *The Bishop of Oxford*, Vaughan, 21, 24.

by the Common-Law Courts. And questions of this nature occur in the Courts of Equity, chiefly with reference to charities and the statutes of colleges, chapters, and the like. Thus, in the matter of *University College ex parte Moorsom*, 2 Phil. 521, one of the points to be determined by the Lord Chancellor was the meaning of the words—*in sacerdotio constitutus*. It ought to have been shown that those words might include a bishop, because the episcopal order is the plenitude of the sacerdotal order; yet they could not include a deacon, who, though *in sacris ordinibus*, is a *minister*, as contradistinguished from a *priest*, and is therefore certainly not *in sacerdotio constitutus*.[a]

A similar want of knowledge of the Canon Law made the framers of the stat. 10 Geo. IV. c. 7, disqualify persons *in holy orders in the Church of Rome* from sitting in the House of Commons; so that persons in *minor orders*, and other members of the Catholic clergy, are not disqualified.

We have (as Mr. Serjeant Wynne observes) many points of antiquity as well as of daily practice from the Canon Law.[b] One instance will suffice. The mode of deciding on the validity of challenges of jurors, by means of *triors*, is evidently derived from the provisions of the Canon Law respecting the recusations of judges and assessors, which are adjudicated upon by arbiters.[c]

And many principles of the Common Law are identical with the Canon Law, and were probaby derived therefrom. Thus the doctrine was laid down, in *Oldknow* v. *Wainwright*, or *Rex* v. *Foxcroft*, 1 W. Blackst. 229; 2 Burrow, 1017; that where a thing is required to be done, a majority who do nothing but merely dispute lose their votes. And so it is established, as in *R.* v. *Hawkins*, 10 East, 211, and 2 Dow. 144, that votes given to a disqualified candidate after notice are thrown away.[d] This doctrine is to be found in the Decretals, lib. i., tit. vi., c. xxii. On this principle was decided the celebrated *Braintree case* in the Exchequer Chamber.[e] Many other instances of the same kind might be given, but this shall suffice.

The uses and the scientific character and place of the Canon Law have now been described. And we have thereby seen a fresh exemplification of the unity of the great science of universal jurisprudence and the way

[a] Devoti, Instit. Canon. lib. i., tit. i., sect. ii., §§ 20, 24; Catech. Concil. Trident., pars ii., §§ 26, 52.

[b] Eunomus, Dial. i., p. 135. And see Reeves, Hist. of the English Law, vol. i., ch. ii., p. 81; vol. ii., ch. viii., pp. 53, 54.

[c] Van Espen. Jus Canon. Univ. pars iii., tit. x., cap. v.

[d] 2 Kyd on Corporations, 11, 13.

[e] *Gosling* v. *Veley and another* (Jan. 22, 1850), 14 Jur. 406; *Veley* v. *Burder* (in error), 7 Adol. & Ell., N. S. 406; 12 Adol. & Ell., N. S. 265.

in which its parts harmonize together for the regulation of human affairs in all their complicated diversity,—extending to all the terrestrial wants and interests of man, and springing from the scheme of Divine polity whereby the world is governed. And so jurisprudence here on earth is united with Heaven by the golden chain of the Divine Law.

THIRTEENTH READING.

(*Michaelmas Term*, 1850.)

ON THE CORPUS JURIS CANONICI.

In my last Reading, I gave a view of the Canon Law as a branch of universal jurisprudence, showing its uses and its relation to that science, and to our own Municipal Law.

We must next proceed to consider the history and principal features of that famous work, the *Corpus Juris Canonici*, which is by far the most important body of law compiled in modern times; and has exercised a greater influence over the jurisprudence of the civilized world than any other, excepting that contained in the books of Justinian.

The learned French civilian, Durand de Malliane, shows, in his Institutes of Canon Law,[a] that the Holy Scriptures, especially the New Testament, are the source of the Canon Law, or the basis and, as it were, the type of the canons—that is to say, the Church has taken from thence the chief rules of her government. Thus, there are in the Corpus Juris Canonici, 879 canons extracted from the books of the New Testament, and very many others are grounded on the principles and spirit of the same books.[b] And the learned writer already cited

[a] See Fleury, Institution au Droit Canonique, part i., ch. i.

[b] The following table shows the number of canons in the Corpus Juris Canonici, which are extracted from each book of the Old and New Testament:—

Genesis	104	Jeremiah	21	Romans	86
Exodus	56	Ezech.	45	1 Corinth.	140
Leviticus	32	Daniel	15	2 Corinth.	29
Numbers	47	Hosea	12	Galatians	30
Deuteronomy	35	Joel	3	Ephesians	19
Joshua	10	Amos	5	Philippians	6
Judges	7	Jonah	3	Colossians	5
Kings	95	Micah	2	1 Thessalonians	5
Chronicles	11	Nahum	4	2 Thessalonians	3
Esdras	2	Habac.	1	1 Timothy	46
Tobias	7	Zephaniah	1	2 Timothy	13
Judith	0	Haggai	1	Titus	8
Esther	0	Zechariah	6	Philemon	0
Job	19	Malachi	13	Hebrews	14
Psalms	131	Machabees	3	James	11
Proverbs	31	Matthew	237	1 Peter	19
Cantic.	8	Mark	20	2 Peter	5
Ecclesiast.	16	Luke	91	John	21
Ecclesiastic.	21	John	167	Jude	1
Isaiah	54	Acts	79	Apocal.	15

informs us that for nearly three centuries the ancient Christians had no other Ecclesiastical Laws than those contained in the Scriptures, and in the faithful and then recent traditions of the Apostles, which constitute the foundation and model of the canons subsequently made by the Church. So Lancelottus lays it down, in his Institutes of Canon Law (lib. i., tit. ii. princ.), that the Divine Law (which is part and parcel of the Canon Law) is that contained in *the Law and the Gospel.*

The augmentation of the Church, the development of its discipline and institutions, and the more complex relations thus arising between its magistrates, ministers, and other members, in process of time rendered necessary the establishment of Ecclesiastical Laws, which are called canons—that is to say, rules, to distinguish them from temporal laws. They arose from the canonical Scriptures and apostolic tradition, or were established by usage, or were enacted by the legislative authority vested in the Church, to make by-laws for the regulation of its own internal affairs, and the furtherance of the purpose for which it was founded.

The most ancient collection of these rules is known by the name of the Apostolic Canons. That the Apostles did, both by practice and precept, establish rules for the government of the Church cannot be doubted; and we find many such in their canonical writings. But this code of ecclesiastical regulations was not drawn up till long after the apostolic times; and they are believed by the learned to be a work of the fourth, or close of the third, century.[a] They are usually printed after the Imperial Constitutions at the end of Justinian's Code, and at the end of the Decree of Gratian in the Corpus Juris Canonici.

The Latins admit only the first fifty canons of the collection, while the Greeks allow the whole number, amounting to eighty-four or eighty-five.[b] But even those fifty canons were ranked by Pope Gelasius (in a council held at Rome in the year 493) among the apocryphal books of the Church.[c]

With regard to the Apostolical Constitutions, they are of less authority than the Apostolic Canons; and many things therein are shown, by Cardinal Bellarmin, to be apochryphal in the worst sense of the word. Their antiquity is proved by the fact that, though St. Jerome does not speak of them, St. Epiphanius, who lived in the

[a] Durand de Malliane, Hist. du Droit Can., pars ii., chap. i.; De Marca, Concord. Sacerd. et Imper., lib. iii., c. ii. And see Bp. Beveridge, Sinodion.

[b] Devoti Instit. Jur. Can. Prolegom., c. v., § 63; Decret. Grat., Distinc. xvi., can. 3, 4; Durand de Malliane, Hist. du Droit Can., pars ii., ch. i., § 3.

[c] Decr. Grat., Dist. xv., *C. Sancta Romana.*

fourth century, makes mention of them; but he describes them as *dubiæ fidei apud multos.*[a]

The history of the Canon Law has been divided, with reference to the form and order of that law, into the following three periods:—

The first comprehends those Ecclesiastical Constitutions which were made before the Corpus Juris Canonici. The second contains the compilation of the Corpus Juris Canonici itself. The third, or latest period, includes the modern additions to the law by decrees of councils, or provincial or national synods, and pontifical laws.[b]

During the first of these periods, there are eight principal codes or collections of canons—that is to say, four in the Greek, and four in the Latin Church. Devoti observes that that process of compilation commenced later in the Latin than in the Greek Church, and that the former seems, until the Nicene Council, held A.D. 324, not to have used any rules except Scripture and tradition, and to have been governed in many things more by established customs than by written law.[c] To understand the nature of the process of development whereby Ecclesiastical Law was gradually formed, it is necessary to remember the distinction which Savigny draws between law and legislation. He shows that in all legal history there is law pre-existent to legislation which subsequently gives to that law a definite and positive expression, thereby investing it with the character of law in the strictest sense of the word—that is to say, not *Jus*, but *Lex*.[d] Thus, we must not suppose that all the Canons of Councils and Decrees of Popes, commencing with the Council of Nicea, were new regulations. They are for the most part either the legislative expression of already existing law, or developments of rules and principles drawn from Scripture or apostolic tradition. And the same very important observation applies with greater force to the Ecclesiastical Laws contained in the Theodosian Code, and in the code and novels of Justinian, which are all confirmatory of the already existing law of the church.[e] This doctrine must always be kept in mind while considering the Corpus Juris Canonici, to which we will now proceed.

[a] Baron. Ann., xxxii., § 18; Durand de Malliane, Hist. du Dr. Can., part ii., ch. ii.

[b] Donjatii, Jur. Pont. Synops., p. 9; appended to Lancelot's Instit., edit. Paris, 1685.

[c] Devoti, Inst. Jur. Can., Prolegom., c. v., § 57.

[d] Savigny, Traité de Droit Rom., liv. i., ch. i., §§ 7, 13, 14.

[e] See an example in Nov. xi., which has been cited, as a remarkable instance of the exercise of ecclesiastical power by the Emperor. But reference to Nov. cxxxi., cap. iii., shows that the provisions of Nov. xi. were confirmatory of what had been ordained by the Pope Vigilius.

The first part of that compilation in order of date is the Decretum, or Decree of Gratian. Its author, Gratian, was a Benedictine, professor of Theology at Bologna, under the pontificate of Alexander III., and a native of Chiusi in Tuscany. He compiled the Decretum in the monastery of St. Felice, at Bologna, about the year 1151, under the pontificate of Eugenius III., and entitled it *Concordia Discordantium Canonum*. He divided it into three parts. The first contains the principles of Canon Law in general, and the rights and qualities of ecclesiastical persons arranged under the title of *Distinctions*. The second is the decision of divers particular cases, and is entitled the *Causes:* it includes the *Tractatus de Pœnitentiâ*. The third is entitled *On Consecration*, because it regards sacraments, rites, ordinations, and consecrations.[a] The first of these three parts is divided into 101 heads or titles, called *Distinctions*, which are subdivided into chapters. The second contains thirty-six heads called *Causes*, subdivided into sections entitled *Questions*, which are again divided into chapters. The third contains five *Distinctions*, divided into chapters. The chapters are sometimes called *Canons*. Such is the general plan of the Decree.

This book was received with such extraordinary favour, that it threw all the previous compilations into oblivion, and was publicly taught in the schools as a necessary part of jurisprudence. But, unfortunately, its author made use of former and defective compilations, such as that of Burchardus, and Ivo of Chartres, instead of going to the original sources. His work, partly from this cause and partly owing to the want of sound criticism in those early times, abounds with errors. Thus it contains spurious Decretals of the ancient Popes, anterior to Siricius in the year 385, or extracts from them; and in many instances attributes to one authority documents belonging to another.[b] Pius IV. and Pius V., in the sixteenth century, appointed commissioners, who are known by the title of *Correctores Romani*, to complete the emendation of the Decretum, which had been commenced by Antonius Coritius and Antonius Democharès,[c] and they ended their task under the pontificate of Gregory XIII., one of their number, who was raised to the throne in the year 1572.

[a] Giannone, Stor., lib. xiv., cap. ult., § 1; Panziroli de Claris Legum Interpretibus, lib. iii., cap. ii.; Devoti, Inst. Jur. Can., Prolegom., cap. vi., § 74; Tiraboschi, Stor. della Letterat. Ital., lib. iv., cap. vii., § 26.

[b] Devoti, *ubi supra*, §§ 75, 76. See the Observations of Tiraboschi, Stor. della Letterat. Ital., lib. iv., cap. vii., § 36.

[c] They made critical notes on the edit. of the Decree published at Mayence, in 1472. Dumoulin (*Molinæus*) followed their example, but was censured at Rome. Among the Correctores Romani was Felice Montalto, afterwards the celebrated Pope Sixtus V.

The materials out of which Gratian composed his work are nearly the same to which previous collectors of canons had resorted. They consist of divers passages or quotations from Holy Writ; of the Apostolic Canons; those of 105 synods, of which six are ecumenical; the Decrees or Decretals of the Popes, to the number of 78, some of which are doubtful or spurious; extracts from ecclesiastical writers, Greek and Latin; the three Pœnitentials—that is to say, that of Rome, of Theodorus and of Beza; extracts from the Code of Theodosius, from the Responsa of Paulus and Ulpian, the Corpus Juris Civilis of Justinian, the Capitularies of the Kings of France, and decrees of some of the Emperors: and portions of ecclesiastical history, of the Pontifical, or book of Episcopal Rites, the Diurnal, and the Ordo Romanus. To these valuable materials Gratian added observations of his own.

The word *Palea* is affixed to some of the canons in the Decretum. The meaning and origin of that word were the subject of much controversy among the learned. One opinion is, that the word in question was derived from the Greek word signifying ancient; another that it designates as straw certain passages of little value; and Hericourt thinks that they were additions made by a person of the name of Palea.[a] Devoti thinks this not an improbable solution of the difficulty. But it seems strange that nothing should be known of the supposed canonist Palea. And I rather incline to the conjecture of those who suggest that probably the passages in question were additions made in the margin of the older MSS., and inscribed with the characters *P. alia*, meaning *post alia*, and intended to indicate that they were to be read after the text of Gratian; and these marginal notes were subsequently copied into the text, and so became interpolations, with their inscriptions transformed into the word *Palea*.[b]

We have next to consider the authority and use of the Decree of Gratian.

The name of Decree seems to point out that this work received a legislative sanction. But it is not so. Reiffenstuel discusses the authority of the Decretum, and he shows, in the words of Scotus (*Doctor Subtilis*), that everything therein has that degree of authority which belongs to the original source whence it is drawn; but that the compilation itself, as a whole, never had force of law in the church.[c]

[a] Hericourt, Loix Eccles., p. 175, E. And see Reiffenstuel, Jus. Canon., Proem. § 5, num. 85, 86. He refers to a singular anecdote related by Cæpolla, Tract. de Cognitione Librorum Jur. Canon., num. 2.

[b] Devoti, Inst. Jur. Can., Prolegom., cap. vi., § 77, note 1.

[c] Reiffenstuel, Jus. Can., Prem. § 5, num. 63—66; Devoti, Inst. Jur. Can., Prolegom., cap. vi., § 79; Suarez, De Leg., lib. iv., cap. v., n. 6; Sauchey de Matrim. Disp. xii., n. 5.

Thus the texts of Scripture, and decrees of Popes and Councils contained in the decree, have that authority to which they are entitled: while the spurious decretals and canons, and erroneous extracts, derive none from their insertion in Gratian's work.

We must, moreover, observe, that the decree is, according to its original title, *Concordia Discordantium Canonum*. It is a collection of authorities of different values, belonging to different times, and frequently conflicting one with the other. Therefore it would be a great error to take indiscriminately any passage as showing what the Canon Law is or was on a particular point.

We find an instance of this in Blackstone (1 Comm. c. vii., p. 260), where he speaks of the "bigotry of the canonists, who looked on trade as inconsistent with Christianity." The learned judge refers to a *palea* in the decree of Gratian (Distinc. lxxxviii., c. xi.), which is an extract from a work attributed to St. John Chrysostom. But the correctors state in their note, that several passages are spurious, and others are to be understood in a qualified manner. The next chapter shows that the extract in question only condemns the frauds and misrepresentations and the worldliness of traders. The thirteenth chapter shows this still more clearly. It begins with a doctrine familiar to modern writers—that of buying in a cheap and selling in a dear market:—*Quid est aliud negotium nisi quæ possint vilius comparari, carius velle distrahere.* And then the writer continues:—"Those merchants are to be held abominable who, forgetting God's justice, pollute themselves through immoderate desire for money; and carry on their trade with falsehood. These are the men whom our Lord cast out of the temple." The passage relied on by Blackstone is of no authority whatever, and it appears clearly that he was not warranted in holding up to obloquy the canonists as bigots.

I have dwelt on this point, because it shows the mode in which the Decree of Gratian ought to be used for practical purposes, and the danger of making use of detached passages of the Corpus Juris Canonici without a knowledge of the Canon Law.

No legal work by a private man has had greater success, and none has been more severely criticized and strongly vituperated. Its defects are admitted, and have been corrected. It has a value which cannot be denied to a compilation of the laws, regulations, and principles whereby the discipline of the church was arranged and carried on during the first eleven centuries; which was subsequently received in the schools and the Courts all over Europe, exercising a great influence over the progress of jurisprudence; and which is still in use throughout the Catholic Roman Church.[a]

[a] In the twelfth century Doctors of Canon Law were created, who were called

The next book of the Corpus Juris Canonici in order of date is that commonly known under the title of *The Decretals.*

Thirty years after the publication of the Decree, there appeared a collection of Decretals or Rescripta of the Popes (which were their laws),[a] either omitted by Gratian or published after his decease, of which the most remarkable are those of Pope Alexander III., and the Constitutions, for which he obtained the sanction of the third General Council of Lateran, held in 1179 (including a regulation of the elections of the Popes), and the third Council of Tours. It was drawn up by Bernardus Circa, afterwards Bishop of Pavia.[b] This work and four others of the same nature which succeeded it, though they occupied an important position in their time, have been in a great measure superseded by the collection called *The Decretals*, which is the second book of the Corpus Juris Canonici. It was drawn up under the authority of Pope Gregory the Ninth, by St. Raymond de Pegnafort, or Pennafort, a learned Spanish Dominican, the third general of that order, and published, with a Papal epistle, in the year 1230.[c]

This work is composed of Decrees taken from the Decretals or letters of the Popes, from Alexander III. to Gregory IX., and some more ancient; and of the canons of the third and fourth General Councils of Lateran, held under Alexander III. in 1179, and Innocent III. in 1215, on which a great part of the Canon Law has been formed. Some of the Popes of the twelfth and thirteenth centuries, who were authors of these Decretals, were very great lawyers, profoundly learned, not only in the ecclesiastical discipline of their own time but in the Civil Law.

St. Raymond was empowered to leave out whatever he thought superfluous, and he accordingly abridged some of the Decretals, which renders it necessary to refer to originals in the older collections, where the case is to be found entire. These omissions (which are supplied in the modern editions) the canonists refer to by the words *in parte decisâ.*[c] Citations from the Decretals are indicated by the word *extra* or the letter X, meaning that it is out of or besides the Decree of Gratian, which was the original Corpus Juris Canonici. Boetius has divided St. Raymond's materials into the following five classes, that is

Doctores Decretorum, from the decree of Gratian. Savigny, Hist. du Droit Rom., vol. ii., p. 172, Paris, 1839. They were made by delivery of a wand (whence they were commonly called Bacillani—*a bacillo vel baculo*) after an examination in the *Decretum.* Panziroli, De Claris Legum Interpretibus, p. 317.

[a] Reiffenstuel, Jus. Can., Proem., lib. i., tit. ii., § 1, num. 10.

[b] Durand de Malliane, Hist. du Droit Can., part ii., ch. vi., p. 248.

[c] Durand de Malliane, Hist. du Droit Can., part ii., ch. vii., p. 256; Hericourt, Loix Eccles., p. 177.

to say—I. Some passages of Holy Writ; II. The canons of the Apostles; III. The Decretals contained in the former collections, and about thirty-six others, from Gregory I., or the Great, to Gregory IX; IV. About thirty-seven canons of councils, from that of Antioch to the fourth of Lateran; and V. Some authorities from the fathers of the church and the Civil Law.[a]

We have next to consider the contents of this celebrated code.

They have been summed up in the following verse, which affords an easy way of remembering them:—

Judex, Judicium, Clerus, Connubia Crimen.

Each of these words answers to one of the five books of the Decretals. The first book—represented by the word *judex*—opens with a title defining the doctrine of the Holy Trinity and the chief points of the catholic faith, on which all spiritual law depends. The second, third, and fourth titles regard constitutions, or ecclesiastical written laws; rescripta, and customary or unwritten Law. These titles are preliminary to the whole work. The remainder of the first book relates—first, to the orders, degrees, and offices of ecclesiastical persons, among whom the prelates hold the first rank, and who are the magistrates and judges established in the Church,—and then to the modes whereby lawsuits or causes may be prevented (such as arbitrations and compromises), and differences either settled at once, or, if it be absolutely necessary, brought under judicial cognizance. This first book is particularly important, because it contains a view of the law and the constitution of the Church, a great portion of which is parcel of the Law of England, or serves to illustrate and explain it. The sixth title of this book is interesting to the English lawyer, because it contains a multitude of valuable rules and decisions touching elections, from whence many things in our law are derived, and which may be useful in many cases arising in our Courts, both temporal and ecclesiastical.

The second book—represented by the word *judicium*—regards the proceedings in civil causes. It consists of four principal points, that is to say—I. The competency of the Court; II. The commencement of the suit by presentation of the libel; III. The proceedings, pleadings, and evidence in the cause; and IV. The judgment or decree, the appeal, and the decision in the appellate jurisdiction.

The system of civil procedure here described, partly taken from Justinian, has been more or less followed or imitated, even in the temporal Courts, in all European countries, and the proceedings of

[a] Durand de Malliane, *ubi supra*, pp. 258, 259.

our ecclesiastical, maritime, and university Courts, and of our Courts of equity, are derived therefrom.

We come now to the word *clerus*, and to the third book. Its contents may be reduced under three heads:—I. The things appertaining to the clergy, including both the moral qualities requisite for their spiritual functions, and temporal things which are necessary for their maintenance; II. Certain rights which are due to churches and to ecclesiastical persons secular and regular—such as tithes, offerings, oblations, and the like; and III. The rights and duties which ecclesiastical persons owe to the rest of the faithful.

Exterior or temporal goods or property are of two sorts with reference to clerks—that is to say, either purely ecclesiastical, or patrimonial. Therefore St. Raymond treats, under the first of the three general heads above mentioned, not only of benefices, prebends, and dignities to which endowments are attached, and the property of bishops and chapters, but of the acquisition of property by means of such contracts as are lawful to clerks.

The law of contracts here laid down is very important in a juridical point of view; because it simplifies and improves the Roman Law of contracts according to principles of Natural Law, and forms the basis of the modern law of contracts. Thus the Canon Law, instead of dividing contracts, according to the method of the Roman Law, into four classes—that is to say, *verborum obligationes*, constituted by the formula of stipulation; *literarum obligationes*, to which writing was necessary; contracts arising from delivery of a thing—such as deposits, *in quibus re contrahitur obligatio;* and those which were perfected by bare consent (*qui nudo consensu constant*)—classes them all under the two last heads. As accessories to contracts, securities are considered in the 21st and 22nd titles, *De Pignoribus et aliis Cautionibus*, and sureties in the 23rd, the title *De Fidejussoribus*. And the extinction of obligations by payment is treated in the 24th title—*De Solutionibus*.

The limited powers of clerks with regard to wills, and the transmission of property by succession, *ab intestato*, are the subjects of the 26th and 27th titles.

The third part of this book of the Decretals contains the law touching the duties incumbent on the clergy, by virtue of their orders and offices in the Church,—that which is due to patrons and founders; and to superiors; and the duties of the clergy to the Church in general —that is to say, the performance of Divine service and the administration of the sacraments. This last class of duties are treated in the 41st and subsequent titles down to the 50th, with which the third book terminates.

The fourth book—represented by the word *connubia*—relates to the sacrament of matrimony, which is a principal cause of the jurisdiction of the Church over the laity. This subject may be reduced to three points. The first contains whatever regards matrimony *in se*, and the things requisite for its validity: the second the consequences or effects of marriage: and the third its dissolution. This book begins with the contract called *sponsalia*, which consists in a promise of future marriage, though by the law of the Decretals, if it be *per verba de presenti*, it amounts to a real marriage, and so it is even if the contract be *per verba de futoro*, provided the parties afterwards cohabit as man and wife. But the Canon Law on this subject is altered by the Council of Trent, which makes the celebration of marriage by, or by the licence of, the parish priest, of one of the parties, in the presence of two or more witnesses, necessary to its validity[a]. The decrees of the Council of Trent regarding discipline were not generally accepted in France, but this important modification of the marriage law was admitted in that country by the ordinance of Blois.

The impediments to contracting marriage are set forth in the second and subsequent titles. Some are *dirimant—impedimenta dirimentia*, which render marriage void,—and others are simply prohibitory, *impedimenta prohibentia*, rendering the parties liable to canonical penances.

The 17th title, *qui filii sunt legitimi*, regards the principal effect of marriage—namely, the procreation of legitimate children; and includes that famous provision whereby children born illegitimate are legitimated by the subsequent marriage of their parents.

The remainder of the book regards the dissolution of a marriage *de facto*, by sentence declaring it void *ab initio;* and divorce *a mensa et thoro*. This part of the Decretals, and indeed the greater part of the fourth book, is important to the English lawyer, because it forms the basis of our own Matrimonial Law.

We come now to the fifth book, represented by the word *crimen*. It contains the mode of commencing criminal proceedings; the crimes of which the Ecclesiastical Courts take cognizance; and the punishments inflicted on offenders by the Church. Those punishments have for their principal object the amendment of the criminal, and they never extend to loss of life or member, or even to a pecuniary fine. They are either purely spiritual, or both spiritual and corporal or temporal.

The most usual punishments are excommunication—greater or lesser,—interdict, and suspension. They are called *censures*, because they tend more to correction than to punishment. The lesser excom-

[a] Concil. Trident., sess. xxiv.; Decretum de Reformatione Matrimonii.

munication is purely spiritual, for it involves only the loss of spiritual privileges; but the greater involves temporal consequences also, such as separation from the faithful. And so it is with suspension, interdict, deposition, and degradation, whereby external privileges and emoluments are forfeited. And imprisonment and compulsory penances are also resorted to in very serious cases, which are corporeal or temporal punishments.

The book of Decretals is superior in authority to the Decree of Gratian, for it is the statute law of the Catholic Church, except so far as it has been altered by subsequent legislation.[a] But we must observe that many things in the Decretals are not received and admitted by the temporal law of particular countries—such, for instance, as legitimation by subsequent marriage, which was never admitted in England. And the Decretals, as well as the other books composing the Corpus Juris Canonici, contain passages, decisions, and principles tending to establish the authority of the popes over the temporal civil rights of kings and states; a doctrine contrary to the public law of Europe, and, indeed, not maintained by the Roman Church, though it has been asserted by individual doctors. There are, moreover, special canons and other ecclesiastical constitutions, customs, and privileges belonging to particular churches and places, which differ from the Decretals in matters of discipline. And this code of canons should not be used without reference to the modern text-books, which show how its contents have been modified, amended, and repealed, and what portions are still in force.

Gregory IX. forbade the publication of any new collection of Decretals without the authority of the see of Rome. Pope Boniface VIII. arranged, in the order adopted by St. Raymond, his own Decretals and those of his predecessors up to Gregory IX., and the decrees of the two General Councils held at Lyons, one under Innocent IV. (the great lawyer Simbaldo Fieschi) in 1245, and the other under Gregory X. in 1274. This collection, which is called the *Sexte*, or *Liber Sextus Decretalium*, is the sixth book or supplement to the Decretals, and the third part of the Corpus Juris Canonici. Citations from it are indicated by the words *in sexto*, or in-6. It is divided into five books.

Clement V. commenced another compilation, which was published in the year 1307, by his successor John XXII., and contains the decrees of the General Council held at Vienne in Dauphiné, in the years 1311 and 1312, where the Templars were abolished, and some of the Decretals of Pope Clement made before and after that council.

[a] Reiffenst. Jus. Canon. Proem., § 6, num. 87.

This book—the fourth part of the Corpus Juris Canonici—is called the *Clementines*, and quotations therefrom are indicated by the word *Clement*, or *Clem.*

The compilations subsequent to the Decretum were originally called *Extravagantes*, because they were out of the Decree which was held to be the whole Corpus Juris. But this name has remained only to the two last parts of the present Corpus Juris—that is to say, the *Extravagantes Johannis* XXII., and the *Extravagantes Communes*. The former work is composed of the Decretals of the Pope whose name it bears, and the latter consists of the Decretals of the Popes from Urban IV. to Sixtus IV. in the year 1483.

The Sext, the Clementines, and both the books of Extravagantes, have the same authority as the Decretum,[a] for they are collections of Papal Statute Law.

It appears, from this description of the Corpus Juris Canonici, that it consists of the following six parts:—I. The Decree of Gratian, to which the penitential canons are usually appended; II. The Decretals of Gregory IX.; III. The Sext, or Liber Sextus Decretalium; IV. The Clementines; V. The Extravagantes Johannis; VI. The Extravagantes Communes. It has been compared with the Corpus Juris Civilis, the Decretum having some resemblance to the Pandects; the Decretals to the code of Justinian, and the other books to Justinian's Novels. And Pope Paul IV. caused Lancelottus to draw up Institutes of Canon Law in the method of those of Justinian.[b] This is a valuable little work, which has been printed with the Corpus Juris Canonici, though it never received force of law.

There is also the *Jus Novissimum*, or most recent Canon Law, comprising the constitutions of the Popes subsequent to those in the Corpus Juris Canonici,—the *Regulæ Cancellariæ*,—the decrees of the Council of Trent, and the declarations of the Congregation of Cardinals, to whom belongs the interpretation of those decrees. The modern Decretals of the Popes, called Bulls, come under the first of these four heads. They are distinguished from Briefs, or Letters Apostolic, in this respect among others, that they are of a higher and more solemn nature, and have a pendant metal seal, whereas the last-mentioned instruments are *sub annulo piscatoris*, sealed with the fisherman's seal on red wax. The *Regulæ Cancellariæ* contains the practice of the Roman Chancery in beneficiary matters. The decrees of the Council of Trent contain, besides the decisions on matters of

[a] Reiffenstuel, Jus. Can. Proem., § 6, num. 87.

[b] Giannone, Stor., lib. xiv., c. ii., § 2; vol. ii., p. 332; Tiaboschi, Stor., Lella Letterat. Ital., lib. ii., cap. iv., § 32.

faith, a code for the reformation of discipline, most important and valuable, even as a mere specimen of legislation.[a]

With regard to the glosses or marginal comments on the Corpus Juris Canonici, they are merely the opinions of private doctors, of no legal authority whatever except as such. The most celebrated among the glossators of the Canon Law were Sinibaldo Fieschi, afterwards Pope under the title of Innocent IV., and Johannes Semeca, surnamed the Teutonic, a disciple of Azo, who made a general gloss on the Decree of Gratian, like that of Accursius on the Pandects, and died in the year 1269.[b]

I have now sufficiently described the body of Canon Law—that famous compilation,—the foundation of all Ecclesiastical Law, and whereof some knowledge should be acquired by whoever desires to obtain a thorough acquaintance with the history of our national law and constitution, or a broad and comprehensive view of the science of jurisprudence, as well as a key to some of its deeper mysteries.

[a] Devoti Inst. Jur. Can. Prolegom., cap. vii.

[b] Devoti Inst. Jur. Can. Prolegom., cap. vi., § 91. See some account of them in Giannone, Stor., lib. xiv., c. ii., § 2, p. 332. Panzirol De Claris Legum Interpretibus, lib. iii., c. vi.

FOURTEENTH READING.

(*Michaelmas Term*, 1850.)

A GENERAL VIEW OF THE CANON LAW.—THE SOURCES OF THE CANON LAW.—THE LAW OF PERSONS.

HAVING shown the uses of the Canon Law, its character as a whole, and the place which it occupies in the science of universal jurisprudence, and given a history and description of the *Corpus Juris Canonici*, I must now lay before you a general view of the Canon Law itself. That view will comprehend both a plan of the law and an exposition of its leading principles.

In the accomplishment of this task I shall scrupulously confine myself to legal views. I shall avoid everything approaching to theological or ecclesiastical controversy, and consider the Canon Law strictly as a system of jurisprudence actually existing in a living form, determining certain classes of questions which arise among men, comprising rules of conduct or of human actions, and defining rights and obligations, the existence of which as juridical facts cannot be denied by any lawyer or statesman.

But it will be necessary not to lose sight of the profound observation of Savigny, that to understand any system of law you must look at it in the same point of view in which it was regarded by those who made it. So we must view the Canon Law in its own spirit. We must consider it as a system of rules and principles governing a certain ancient society or body politic, which is a great historical fact, and which has a definite constitution framed for certain purposes, both immediate and ultimate.

This is the only method of understanding the Canon Law, without which national or local Ecclesiastical Law, such as that of the Protestant Establishment of this country, cannot be comprehended. The Papal or Catholic Canon Law is the parent of all Ecclesiastical Law, and especially of that which forms part of the law of this land under the name of the Queen's Ecclesiastical Law. For the comprehension of this part of our Municipal Law we must first study, in the manner which I have pointed out, that system of which it is a detached branch —namely, *the Canon Law*. But I have shown in my two last Readings that the Canon Law deserves to be studied for its own sake, as a

branch of universal jurisprudence and a necessary part of that science. I shall therefore treat it not as a mere auxiliary, but as a substantive part of legal knowledge.

The order of Justinian's Institutes, which classifies the law under the three heads, of *Persons*, *Things*, and *Actions*, will be most convenient for our purpose. It is recommended by simplicity and reason. It is moreover adopted by Lancelot and other great canonists, and recognized by Gratian himself, though he places the matter and form of judicial proceedings immediately after the Law of Persons and before the *tractatus de consecratione*, which treats of sacred things.[a]

Before explaining the law under these three heads, we must obtain a clear idea of the *fontes juris*,—the sources of the law itself, the parts into which it is divided with reference to the diversity of those sources, and the classification of those parts.

The Canon Law consists of a body of rules called *Canons*, whereby the Church visible on earth, the Catholic Church, is governed. It is called, not *Lex*, but *Jus Canonicum*; and the rules whereof it is composed are called *Canons*, to distinguish them from temporal laws.

Its objects are twofold—immediate, and ultimate. The immediate object is the due performance of Divine worship, and the fulfilment of all the other functions and duties belonging to the church. The ultimate object is that of the Church itself.[b]

Those canons or rules are divisible into classes of laws derived from different sources, and differing one from another both in form and in substance. The principal and primary classification is thus given by Lancelot in the commencement of the first title of the first book of his Institutes: "*The Canon Law consists of the precepts of the Divine Law, of usage, and of constitutions.*"

This concise summary of legal sources contains the first and grand distinction between Divine Laws and human Laws. The former are the essential part and the foundation of Ecclesiastical Jurisprudence, which is immutable; while the latter are supplementary and auxiliary, and spring from the authority vested in the Church considered as a body politic, instituted for certain purposes, to make such regulations as are requisite for the fulfilment of those purposes. And here we see that important distinction between immutable laws and arbitrary or mutable laws, which runs through every branch of the science of universal jurisprudence. The visible Church being a society composed of men, there is a certain analogy between the rules governing it and the

[a] Durand de Malliane, Hist. du Droit. Can., p. 226.

[b] Lancelot. Instit. Jur. Canon., lib. i., tit. i., § 1. *Est igitur Jus Canonicum quod Civium Actiones ad finem æternæ beatitudinis dirigit.* And see Barbosa Collectanea Doctorum, tom. v., p. 16, in part i.; Decreti Distinc. iii., c. i.; Panormitani Comm. in Lib. i., X. (Decretal) Tit. De Constitutionibus.

laws regulating other communities. And indeed this analogy seems essential to the harmony of that general system or economy which Providence has ordained for the government of mankind by the subordination of men among themselves according to their functions, and by the appointment of general rules of conduct called laws.[a]

That man may be perfectly governed by civil society alone is a proposition which cannot be maintained. Experience shows that another order of government (in *some* shape) is also requisite, which regards man in his relation to a more extended and durable sphere of existence than human life, and a higher power than the civil magistrate. These systems or orders of government form the general constitution or economy which governs the world; and they must (if properly understood) harmonize together by analogy and a certain unity of purpose. So the laws of the Church bear an analogy to the laws of the temporal order of human society.

The first great branch of the Canon Law must now be considered, namely, the Divine Law, which is the law ordained by Divine authority, and promulgated or made known to man by divers means.

It is subdivided into two parts, under the heads of Written Law and Unwritten Law. And first of Written Divine Law. It is contained in the books of the Old and New Testament. The Old Testament contains moral revealed law, ceremonial, and judicial laws. The two last, being either typical or intended especially or only for the Jewish people under the old dispensation, were terminated by fulfilment or abrogation on the coming of Christ and the completion of the Christian dispensation; except so far as certain things are retained or derived by the Church from the Jewish Law. As for the Moral Law, it is still in force, and consists of declarations, explanations, or precepts of the Law of Nature.[b] And the precepts or rules and principles contained in the New Testament are the principal part and the very foundation of the Canon Law. The Divine Law contained in the Law and the Gospel is immutable.[c]

Even the ceremonial and judicial law of the Old Testament may in one sense be called immutable, because, as Suarez observes,[d] it could not be changed by any human authority. And indeed it has expired by fulfilment, or because it is no longer applicable. Thus it was rather a temporary than a mutable law; but, on account of this peculi-

[a] See Domat, Droit Public, Preface.

[b] Devoti, Inst. Canon. Prolegom., c. iii., §§ 32, 33; Fleury. Institution au Droit Ecclesiastique, pars i., ch. ii.

[c] Lancelot, Jur. Can., lib. i., tit. ii., princip.

[d] Suarez, De Legibus, lib. ix., cap. ix.

arity, it is sometimes called Divine positive or Divine arbitrary law.[a]

We come now to the unwritten Divine Law. It consists of two branches, namely, Divine Tradition, and Natural Law.

Divine Tradition is so called to distinguish it from human or Ecclesiastical Tradition; and it contains that part of the Divine Law which was not recorded in the Scriptures, but handed down in the Church from the time to which the books of the New Testament relate, and proceeds from the same source.[b] It is proved by the ancient writings and consent of the Fathers, and the practice and judgment of the Church.

Natural Law is pointed out to man by the light of reason confirmed by revelation, and it is a part of Divine law even taken by itself, because God is the author of Nature from whence arises man's responsibility and his relation to his Creator and to other men. From that double relation spring the two primary laws, obliging him to love God and his neighbour, from whence all laws are directly or mediately derived.[c] This part of our subject I have already explained in my first Reading. It is sufficient to add here, that the Natural Law is a link which connects ecclesiastical with temporal jurisprudence, being an integral part of both, and bearing the same relation to the positive or arbitrary laws contained in each of those branches of universal jurisprudence. We here see a fresh proof of the unity of that great science, and the way in which its branches are all, as it were, *necessarily connected with each other* by analogy and community of principles which run through the whole system.

Having thus taken a view of Divine, we will proceed to human Ecclesiastical Law. We have seen that Lancelot reduces this second branch of the Canon Law to two parts,—usage, and constitutions. The former is unwritten, and the latter is written, law.

Human Ecclesiastical Law regulates a variety of things which are not provided for, or not sufficiently provided for, or defined by the Divine Law. It arises from the legislative power, which Suarez learnedly shows to be inherent in the Church.[d] That power indeed, to regulate internal affairs, belongs in one form or another, and to a

[a] Fleury, Instit. au Droit Eccles., pars i., ch. ii., p. 39; Durand de Malliane, Institutes du Droit Can., L. i., tit. ii., p. 46.

[b] Devoti, Inst. Canon. Prolegom., cap. iv., § 47. St. Basil says, Dogmatum et Institutionum quæ in Ecclesia servata sunt alia quidem habemus ex doctrina quæ literis consignata sunt, et alia vero ex apostolorum traditione ad nos transmissa. . . . . Gratian, Can. v., Distinctio ii.

[c] Suarez, De Legib., lib. ii., caps. v., vi. See Domat, Loix Civ. Traité des Loix. See First Reading, *supra*.

[d] Suarez, De Legib., lib. iv., c. i.

greater or less extent, to communities and bodies politic by the general principles of public law, so far as it is requisite for the attainment of the ends for which they exist, and so far as they are not restricted by a superior authority.[a]

This part of the Canon Law differs in three important respects from the Divine Law. 1st. Its authority proceeds directly from the jurisdiction of the Church. 2ndly. Considered simply as human law, it is mutable. 3dly. Whereas the Divine Law is obligatory everywhere, the human Law is more or less general in its operation or power, according to the authority from which it emanates, and the consent of those who have received it.[b]

I have said that it is mutable if considered simply as Human Law, because canons of this description are in very many instances declaratory of the Divine Law, and therefore partake of its immutability. They are analogous to Municipal Laws declaring and enforcing Natural Laws. And thus Fleury observes that, for the most part, the canons made by councils and otherwise, by the authority of the Church, are not intended to introduce new law, but only to explain and declare the Divine Law, and repress and reform abuses contrary thereto.[c]

The unwritten or Customary Law of the Church resembles temporal Customary Law. Thus it must be ancient, laudable, or not contrary to Divine Law, and its authority is grounded on the tacit consent of the legislative power.[d] It may also be either general, or local—that is to say, restricted to some particular country or church. This Customary Law principally regards rites—that is to say, the celebration of Divine worship, and the sacraments, and the ceremonies and other matters belonging thereto.[e]

To the Customary Law we must add human or ecclesiastical traditions, which bear a resemblance thereto. They consist of certain uninspired precepts, regulations, or practices of the Apostles and their successors, which have been handed down and observed from time immemorial in the Church. They regard discipline, and not matters *de fide;* they are for the most part confined to certain countries or places, and they are mutable.[f]

[a] Domat, Droit Publ., L. i., tit. xv., sect. ii., § 5; 2 Kyd on Corpor. xcv., ch. iii., sect. x.; Hob. 211; 1 Lord Raym. 498; 1 Bar. 1829. And see the principle (limited) as to custom in Co. Litt. 110. b., and n. 2. And see the principle in L. ii., ff. De Jurisdic.

[b] Gratian, Distinct. ix., in fin., and x., initio.

[c] Fleury, Institut. au Dr. Eccles., pars i., ch. ii., p. 41.

[d] Lancelot, Instit., lib. i., tit. ii., §§ 1, 2; Devoti Instit. Prolegom., c. iv., § 50; Gratian Distinc. viii., can. 2, 3, 4.

[e] Fleury, Inst., *ubi supra*, p. 44.

[f] Devoti, Instit. Prolegom., c. iv., §§ 48, 49; Gueranger Institutions Liturgiques, tom. i., p. 25; Concil. Trident., sess. xxii., c. v.

We come now to written human laws, which are included under the general denomination *Constitutions.*[a] They are divisible into three classes—namely, the decrees of the Popes, the canons of councils, and the writings of the holy fathers. *Decreta summorum Pontificum, statuta vel canones conciliorum, et dicta sanctorum vel scripta et sententiæ SS. Patrum.*[b]

The two former constitute what may be called *the Statute Law of the Church.* They are of the same nature and of equal authority.[c] The Decrees or Decretals, or laws of the Popes, are either general, which apply to the whole Church, or special—that is to say, restricted in their operation to some particular cause, person, place, or time. Of the latter description are *rescripts*, which are issued in answer to some petition or other such application, and are always dependant on the express or implied condition *si preces veritate nitantur.* They are entitled of grace or of justice, according as they proceed from the favour of the sovereign Pontiff, or relate to the administration of justice.[d]

Canons of councils or synods differ according to the authority of the council or synod by which they are enacted. Councils are either œcumenical, that is, general, or particular—that is to say, patriarchal, provincial, or episcopal. Those of the first kind are assembled by summoning the bishops of the whole church, with the consent or by the authority of the Pope. The principal synods of this sort are four, namely, those of Nicea, Constantinople, Ephesus, and Chalcedon.[e]

Patriarchal and provincial councils are assembled by the patriarch or metropolitan convoking the bishops of his patriarchate or province. They are called national synods when the patriarch or metropolitan presides over a nation, or the bishops of a nation are summoned.[f] Diocesan synods differ from those already described, for they consist not of bishops, but of the archpresbyters or rural deans, the archdeacons, the chapters, all the clergy holding dignities, and all having cure of souls in the diocese. They are convoked by the diocesan, and he presides over them. Whatever is decreed by these assemblies is binding on the whole diocese.[g]

The third part of the written human Canon Law consists in the

[a] Reiffenstuel, Jus. Canon., lib. i., tit. ii., De Constitutionibus.

[b] Lancelot, Instit.,L. i., tit. iii., princip.; Devoti, Instit. Prolegom., c. iii. § 34; Reiffenstuel, Jus. Canon. Proem., § 3, num. 50.

[c] Lancelot, Instit., L. i., tit. iii., § 6.

[d] Devoti, *ubi supra*, § 36.

[e] Devoti, Instit., *ubi supra*, § 38; Lancelot, Instit., lib. i., tit. iii., § 2.

[f] *Ibid.*, § 41; 1 Black. Com. (Introd.) 82.

[g] Devoti, Instit., *ubi supra*, §§ 43, 44.

maxims and rules in the writings of the fathers, *Scripta SS. Patrum*. They are not binding, *proprio vigore*, because those great men are the doctors of the law, and not the makers of the law. Nevertheless, their opinion is conclusive where they agree,[a] and many passages of their writings are incorporated in the Corpus Juris Canonici, and in the bulls and letters of the Popes and canons of synods. This last circumstance explains why this portion of the Canon Law is classed under the head of written law.

There are moreover divers Civil Laws, for the most part extracted from the Code of Theodosius and the Corpus Juris Civilis and the Capitularies of the ancient French Kings, which have been placed in the Corpus Juris Canonici. These belong to the Canon Law, not *suo jure*, but by a sort of adoption.[b] They are sometimes called canonized laws.

I have now shown the various sources of the Canon Law, and the nature of those sources. I have shown the grand division of the Canon Law into two branches, one of Divine and the other of human Law, each of which is again divisible into written and unwritten law; and I have explained the diversities of the kinds of laws comprised within each of those subdivisions. I have thus presented to you a general plan of ecclesiastical jurisprudence, in which you cannot fail to admire the vastness of that science, the harmony and arrangement of its parts, and the exemplification that it affords of the unity of jurisprudence and the analogy of its branches one with another.

We must now proceed to consider the Canon Law with reference to its objects—that is to say, *persons, things, and actions*.[c] We have examined its nature *in se*, and as a rule; and it must now be considered with regard to the rights and obligations arising from that rule.

And first, of the Law of *Persons* for whom the law is made.[d]

Domat observes that God has made necessary to man and the society of men, not only an infinite number of things which they cannot have without the assistance of a great many arts and commerce, requiring different professions, but an order of temporal government, and of everything appertaining to the exercise of religion. Divers arts and sciences, and other different sorts of conditions of men and professions, are thereby also rendered necessary. And out of all

[a] *Ubi supra*, § 45.
[b] *Ubi supra*, § 46.
[c] Vinnii, Comment. ad Institut., lib. i., tit. ii., § 12.
[d] Instit. (Justin.), lib. i., tit. ii., § 12; Lancelot, Instit. Jur. Canon., lib. i., tit. iii., § 8.

these together he has composed a body which has its several members for several uses.

It is these several conditions and professions which, being joined together, compose the general order of men in a state; so that each person has his situation and order in the society of men, according to the use of the functions and duties which his condition requires of him towards the public.[a] And thus, as the state forms a body of which every one is a member, and as the body is composed of divers members, so there is a subordination not only of all the members under the sovereign power, but also of the members among themselves, according as the functions of the one depend on the functions of the others.

Such are the principles on which the classifications of persons, according to the public law, are grounded. And as the laws which regard the outward regulation of matters belonging to religion are part of public law,[b] so the clergy, whose office comprises the matters to which that part of the public law relates, are one of the orders of society in the state.[c] And this is so in certain respects, even with regard to some religious bodies not politically incorporated or connected with the state, nor established as the church of the state.

The classification of persons by the Canon Law is based on different principles. It has no reference to the state, but regards men in the character of members of a great society, or body politic, called the Church. That community may, as I have shown, belong to public law. And as its regulations affect private rights, it may also belong to private law. But, as Savigny observes, its authority over the interior man, and its character of universality, preclude its assimilation with either public or private law, and its subjection to a purely national government.[d] Therefore the classification of persons by the Canon Law has reference not to the order of civil society, but to the polity and regimen of the Church, and the order and situation which persons hold according to their duties and functions therein. And here we shall observe the principle of subordination, not only of all the members under a sovereign power, but also of the members among themselves, according as the functions of one depend on the functions of the other. This is a very important point of analogy between ecclesiastical and public law. It exemplifies the harmony of the laws whereby mankind are regulated in their different relations here on earth.

The first division of persons by the Canon Law is that which distinguishes the clergy from the laity. The clergy are those who are

[a] Domat, Droit Publ., lib. i., tit. ix.

[b] L. i., § 2, ff. De Justitia et Jure.

[c] Domat, Droit Publ., lib. i., tit. ix., sects. ii., iii., § 2.

[d] Savigny, Traité de Droit Romain, vol. i., pp. 26, 27. Paris, 1840.

devoted to the service of the Church as its public officers. The laity are the rest of the members of the Church.[a] The classification of the latter is for the most part by Natural Law, or identical with the Civil Law.

The clergy are included in the legal term *Hierarchy*, which is defined to be the power of governing the Church, and to administer the sacraments, rites, and functions of religion.[b]

The powers and duties of the clergy are of two sorts. Some regard sacred functions, and others belong to government or administration. The former spring from order, and the latter from certain ecclesiastical offices which give jurisdiction. Thus, there are two sorts of hierarchy; the hierarchy of order, and the hierarchy of jurisdiction.[c]

And first, of the hierarchy of order. It regards the sacred ministry, the administration of the sacraments, and other spiritual things.[d] With reference to this species of hierarchy, the Canon Law divides the clergy into three classes; for some of them are in the priesthood (*in sacerdotio*), some in holy orders (*in sacris*) though not included in the first class, while others are neither *in sacerdotio* nor *in sacris*. A more general classification divides the clergy into two sorts according to their functions, which are *the Priesthood* (*Sacerdotium*), and *the Ministry* (*Ministerium*). The first includes bishops and priests, and the second deacons and the orders below them.[e]

We must now take a rapid view of the different orders included within these classes.

According to the canonists, they are nine; and according to the theologians, seven. The seven are the priesthood, which includes bishops; the diaconate, or order of deacons; and the subdiaconate, or order of subdeacons; all of which are holy orders. The remaining four, which are called *minor* orders, are the orders of acolytes or acolythists, exorcists, readers, and ostiarii or doorkeepers. The canonists make the orders nine, by reckoning bishops as a distinct order, and by including the first tonsure among minor orders.[f]

Bishops are *in sacerdotio*, and they have the plenitude and perfection of the priesthood. This order is the source of all the others, and

[a] Devoti, Inst. Canon., lib. i., tit. i., § 1; Fleury, Institut. au Droit Eccles. Prem. Part., ch. iii.; Bingham, Antiquities, book i., ch. v.

[b] Devoti, Instit. Can., lib. i., tit. i., § 4, note (1); Reiffenstuel, Jus. Can., lib. i., tit. xxxiii., § 1.

[c] Devoti, Inst. Can., *ubi supra*.

[d] *Ibid.*, tit. ii., § 2.

[e] Fleury, Instit. au Droit Eccles., pars i., ch. iii., p. 49. The Council of Trent divides the clergy into *bishops*, *priests*, and *ministers*.

[f] Reiffenstuel, Jus. Canon., lib. i., tit. xi., sect. i., num. 5.

comprehends them all.[a] It is distinguished from that of priests by peculiar privileges, the chief of which are that of conferring orders, commonly called the power of ordaining; of administering confirmation; and consecrating altars, churches, and burial places.[b]

Priests are the next order. They have the power of consecrating the Eucharist, baptizing, administering the other sacraments except order and confirmation, and of preaching and teaching.[c]

We come now to those who are not *in sacerdotio*, but *in sacris*. And with them commences the ministry as contra-distinguished from the priesthood. The first order in this class is the Diaconate. The functions of the deacon are expressed by these words of the Roman Pontifical:—*Diaconum opportet ministrare ad altare, baptizare, prædicare.* He must attend on and assist the bishop and the priest at the altar, baptize and preach.[d]

Subdeacons are properly subsidiary to the order of deacons. Their duty is to assist the deacon at the altar, to prepare all that is required for Divine service, and to read the Epistle.[e] This is the first of the orders conferred, as minor orders are, without imposition of hands.[f]

The remaining orders are not holy, but minor orders; and those on whom they are conferred are neither *in sacerdotio* nor *in sacris*. They are *acolytes, exorcists, readers, doorkeepers,* and (according to the Canonists) clerks simply tonsured. They have different inferior ministerial functions, which are indicated sufficiently for our purpose by their names.[g]

Such are the chief rules of the Canon Law regarding the hierarchy of order.

We must now proceed to the hierarchy of jurisdiction.

The status conferred by orders gives a capacity to have and exercise jurisdiction; and this rule shows the relation which the two species of hierarchy bear one to the other. But the power called jurisdiction is not so inherent in order as to be inseparable therefrom. Jurisdiction depends on an authority *over or with regard to persons.* Thus a bishop who has been deposed retains order, but he loses jurisdiction, because he has no longer any *subditi*—that is to say, persons

[a] Hericourt, Loix Eccles., ch. i., p. 185, E.I.; Fleury, Instit. au Droit Eccles., pars i., ch. iii., p. 49.

[b] Devoti, Inst. Jur. Can., lib. i., tit. ii., sect. i., § 13.

[c] *Ibid.*, § 22.

[d] Devoti, Inst. *ubi supra*, § 27.

[e] *Ibid.* § 27. Van Espen, Jus. Canon., pars i., tit. i., cap. iii. A learned author, but to be read with caution.

[f] Van Espen, *ubi supra*, num. 4.

[g] Devoti, Inst. *ubi supra*, § 29, *et seq.*; Van Espen, *ubi supra*, cap. ii.; Bingham, Antiq. book iii. chap. i., &c; Devoti, Inst. lib. i., tit. i. § 12.

over whom that jurisdiction can be exercised. Therefore, if he perform any act belonging to jurisdiction, such as excommunication, it is null and void. But if he do anything arising from order, such as administering the sacraments of ordination or confirmation, it is valid, though he is thereby guilty of a grave crime. *Fieri non debuit, sed factum valet.* The same is the case with regard to a bishop who is a heretic or a schismatic, or excommunicated.[a]

It follows, from these principles, that for a bishop to possess the powers both of orders and of jurisdiction, he must have both ordination, and what is technically called, lawful *mission*, or *legitima missio ;* whereby certain persons are assigned to him, who are made subject to his jurisdiction. This assignment must proceed from a higher ecclesiastical power,[b] and not from the civil magistrate ; because no one can assign to another a spiritual jurisdiction, unless he has it himself in the first instance. It is on this principle that a clerk receives the cure of souls in a particular parish, not from the patron nor from the civil power, but from the bishop who gives him *mission* by instituting him to the benefice.[c] The principle of the Canon Law, is—*Nemo dat quod non habet.*

Having shown these fundamental principles, let us proceed to the further examination of the hierarchy of jurisdiction.

That hierarchy regards the polity and regimen of the Church, which, being a society of men, must have its magistrates and officers for due order and good government, and the fulfilment of its own purpose, as civil societies have.[d] This is evident, for the Church is a society not of souls only but of men ; and it therefore requires an outward and visible polity or constitution.

The Canon Law regards the Church as a monarchical body, or a body politic in the nature of a monarchy, of which the supreme Pontiff is the head.[e] This body politic, thus fashioned in a monarchical form, has a supreme Parliament called an Œcumenical or General Council, of which the Pope is the head, and a necessary part, as the Crown is of the Parliament in the civil constitution of this kingdom.[f]

[a] Devoti, Inst. lib. i. tit. ii., §§ 3, 4, 5 ; see the Decretals, lib. i., tit. xiii., *De Ordinatis ab Episcopo qui renunciavit.*

[b] *Ibid.* § 6. And see what Hooker says respecting "*Bishops with restraint.*" Eccles. Polit. b. 7 § 4.

[c] Institution is where the Bishop saith, *Instituo te rectorem talis Ecclesiæ, cum curâ animarum, et accipe curam tuam et meam ;* Co. Litt. 344. b.

[d] Devoti, Inst., lib. i. tit. iii., § i.

[e] *Ibid.*, Prolegom., cap. ii., § 19.

[f] *Ibid.*, §§ 21, 22.

The Church of the Canon Law unites a federal to a monarchical constitution. It is composed of a variety of ecclesiastical bodies or churches, each of which has its superior bishop, its synod or church parliament, and its peculiar laws, customs and privileges. All these bodies are represented in the Œcumenical Council by their bishops. And they stand respectively in divers relations to the civil communities wherein they exist, and are affected in divers ways by the temporal laws, customs, and institutions of those communities. But, notwithstanding these local peculiarities, they are all bound together into one universal body by identity of faith, by similarity of constitution, by community of laws, and by their submission to the one supreme power,—the Holy See—which is the centre of their unity and the summit of the hierarchy of jurisdiction.

Under that supreme power the hierarchy of jurisdiction is continued by a regular gradation of magistrates and officers, the nature of whose functions, and the extent of whose authority, are defined by the Canon Law.

Thus, patriarchs have the ecclesiastical government of several nations or countries; primates, that of one nation or country; metropolitans, that of a province; and diocesan bishops of a diocese.[a] All these are equal in point of order, for they are all bishops; but one is superior to the other in the hierarchy of jurisdiction. And so the Pope has no order distinct from the Episcopate.[b] But he is supreme head of them all in the hierarchy of jurisdiction, of which he alone has the plenitude.

The remainder of the magistrates of the Church are created to assist the bishop. Such are coadjutors, the diocesan's deputies and assistants; vicars, who are the bishop's vicegerents for certain purposes as Vicars Apostolic are to the Pope; archdeacons, who are the bishop's vicars in their archdeaconry, and are called *oculi Episcopi;* and archpriests, or rural deans.[c] The most numerous and necessary of these inferior magistrates are the parochial clergy, who preside over and have the cure of souls in parishes, which are the smallest territorial divisions of the Church. They have a jurisdcition *proprio jure*, on institution to their cures, by the bishop.[d]

There are also various offices to which belongs administration without jurisdiction or pre-eminence. Some offices also have a certain pre-

[a] Devoti, Inst. Canon., lib. i., tit. iii., § 4.

[b] Devoti, Inst. Canon., lib. i., tit. ii., § 3.

[c] *Ibid.*, lib. i., tit. iii., sect. viii. § 71; Van Espen, Jus Eccles. Univers., pars i., tit. vi.

[d] *Ibid.*, lib. i., tit. iii., sect. x., § 87.

eminence or rank assigned to them, and then they are called dignities. Such are different offices belonging to Cathedral and Collegiate Churches.[a]

I have now given a sketch of the fundamental principles of the Canon Law of Persons, showing the general constitution of the Church, especially that part of it to which its government and administration belong. The Law of Things and Actions will be the subject of my concluding Reading.

[a] Devoti, Inst. Canon., lib. i., tit. iii., §§ 10, 11; *Ibid.*, tit. iii., sect. viii.; Van Espen, Jus Eccles. Univers. pars i., tit. xi., xii.

FIFTEENTH READING.

(*Michaelmas Term*, 1850.)

GENERAL VIEW OF THE CANON LAW CONTINUED.—THE LAW OF THINGS.—THE LAW OF ACTIONS.

THE last Reading gave you a sketch of the first great head of the Canon Law—*the Law of Persons*. You have seen the chief classification of persons with regard to their due subordination and the place which they respectively occupy in the public economy of the Church. You have before you the outlines of the Church's constitution according to the Canon Law, with the principal features of that constitution. The Law of Things is the next subject for our consideration.

It is here necessary to notice an important distinction between the Canon and the Civil, and indeed, between Ecclesiastical and Temporal Law.

Savigny observes that every relation of law (which consists in a right or an obligation) has its peculiar rules, whereby it commences and terminates for a given person.[a] And he cites a celebrated law of Ulpian, who says—*Totum jus consistit aut in adquirendo, aut in conservando, aut in minuendo.* Ulpian explains this dictum by adding that the law regards either the acquisition of something by some one, or whether and how some one shall retain a thing or right, or alienate or lose it. If Civil Law be regarded with reference to its ultimate and practical effect, this comprehensive statement will be found correct. The reason is, that though Civil Law is derived from the two great primary laws from whence hang all laws, yet as it regulates man in civil society, and with reference to its order, so its ultimate effect relates to the use of things in that state. And thus civil or temporal law regards rights and other things *in the light of property.*

But it is otherwise with Ecclesiastical Law. It looks upon things with reference to the direct object and the ultimate object of the Canon Law, which are those of the Church itself. Thus we shall find that this famous text of Ulpian applies to only one class of things in

[a] Savigny, Traité de Droit Rom., vol. iii., p. 2; L. xl., ff. De Legibus; Instit. tit. De Interdictis, §§ 2, 3, 4.

the Canon Law; namely, that which includes ecclesiastical property, considered as such, and persons considered with reference to property.

Having stated this important distinction, we will proceed to the first and general classification of things in the Canon Law.

Ecclesiastical things are divisible into four classes—that is to say, 1st, Things Spiritual, such as the sacraments; 2nd, Things Sacred, or *sacræ vel sacrosanctæ*—as for example, churches and sacred vessels; 3rd, Things Religious (*religiosæ*)—as for instance, religious houses, hospitals, and burial-places; and 4th and lastly, Things Temporal—as tithes, offerings, and other ecclesiastical property.

Things purely spiritual—as grace, faith, hope, and charity—belong not to law, but to theology.[a] But there are also spiritual things of a mixed nature, partly invisible and incorporeal and partly corporeal or visible and perceptible to the senses. Notwithstanding this mixed nature they are properly called spiritual, because their immediate purpose or end is spiritual. This mixed character places them within the province both of theology and of Canon Law. Their end or effect regards theology; and as the Canon Law consists of the rules whereby the outward conduct and acts of the persons composing the Church are governed, therefore this class of things is partly regulated by the Canon Law, and their end is the same as the ultimate end of the Canon Law, which is that of the Church itself.

Among these things, the first rank is occupied by the sacraments. A sacrament is thus defined by the canonists and theologians:—*Sacramentum est invisibilis gratiæ visibile signum ad sanctificationem nostrum Divinitus institutum:* or (as in the decree of Gratian) *Sacramentum est invisibilis gratiæ visibilis forma.*[b] The latter definition is taken from St. Augustine, though not precisely in his words, as the Roman correctors of the decree observe.

The definitions show, and it is expressly laid down by the canonists, that three things are requisite to constitute a sacrament: namely, 1st, Divine Institution; 2ndly, A visible sign; and 3rdly, An invisible grace conferred and indicated *by* that external sign.[c]

Such is the general legal nature of sacraments. They are placed by Lancelot among corporeal things.[d] But in this particular he seems to have been misled by adhering to his model—the Institutes of Justinian,—where the principles of the Civil Law were not strictly appli-

[a] Devoti, Inst. Canon., lib. ii., tit. ii., § 2; Lancelot, Inst. Jur. Can., lib. ii., tit. i., princip.

[b] Devoti, Inst. Canon., lib. ii., tit. ii., § 1; Gratian, Can. 32, Dist. 2, Tractat. de Consecratione. And see Catechis. Roman., pars i., c. i., num. ii.

[c] Devoti, Inst. Canon., lib. ii., tit. ii., § 2; Concil. Trident., sess. 7, can. 8.

[d] Lancelot. Inst. Jur. Can., lib. ii., tit. i., § 1.

cable. Justinian, in the second title of the second book of his Institutes, divides things into two classes—that is to say, things corporeal, and things incorporeal. He says that the former are those things which can be touched—such as land, a slave, a dress, money, and the like; and the latter are things which cannot be touched, but consists in a right—such as an inheritance, a usufruct, a use, and obligations in whatever way contracted. This is taken from a law of Gajus, in the Pandects,[a] and it is founded on the philosophy of the Stoics. The same distinction exists in our law, as appears in 2 Blackst. Com. ch. ii. iii., and Co. Litt. 19. b., 20. a.

Ecclesiastical property is, in respect to this distinction, of the same legal nature as other property. But to the spiritual things which we are now considering, the texts of the Civil Law just cited are not correctly applicable. Those things are of a mixed nature, partly corporeal and partly incorporeal, or partly visible and partly invisible.

The Canon Law limits the number of the sacraments to seven; that is to say—baptism, confirmation, the eucharist, penitence, extreme unction, order, and matrimony.[b] I shall not, for several reasons, enter into an explanation of the law regarding each of these; but it is necessary here to lay down the following general legal distinctions, from whence important results arise.

The first four are called *necessary*, because the law requires that they should not be neglected by any one; and the remaining two—order and matrimony—are denominated *voluntary* sacraments, because all men are not, nor is any specific person, bound to receive or enter into them;[c] though in one sense they also are necessary, because they are requisite in and for the Church.[d]

Another important distinction is this. Some of the sacraments impress a character, and the others do not. Of the former class are baptism, confirmation, and order; and the remaining four belong to the latter class. That character which those three sacraments impress on the person constitutes a spiritual status or condition which is indelible.[e] This rule of the Canon Law was recognised as part of the law of England in the case of *Barnes* v. *Shore*, 8 Q. B. 641, where the Court held that a person in holy orders cannot divest himself thereof, so as to avoid correction for breach of ecclesiastical discipline.

[a] L. i., § 1, ff., De Rerum Divisione.

[b] Concil. Trident., sess. 7, De Sacramentis, can. i.

[c] Lancelot, Instit. Jur. Canon., lib. ii., tit. iii., § 1.

[d] See the consequence drawn from this distinction, as to order, by Gratian, in his note, to Caus. i., quæst. i., cap. xliii.

[e] Devoti, Inst. Canon., lib. ii., tit. ii., § 11; Concil. Trident., sessio xxiii., De Sacrament. Ord. can. iv.

The three sacraments which impress a character on the recipients also have this peculiarity, arising as a consequence from that effect. They cannot be repeated, or received more than once by the same individual;[a] because the character or spiritual status being once indelibly stamped on the person, a repetition of the sacrament would be a mere nullity. And here we must observe an analogy of reason between this rule of the Canon Law, considered as such, and the maxim of the Civil Law, *Meum amplius meum fieri nequit.* According to that maxim, Ulpian decides that a sale to a man of that which is already his is null and void.[b] And so, by the Civil Law, a bequest to a man of that which is already his is of no effect:[c] for, as Paulus says, *Dominium non potest nisi ex unâ causâ contingere.*[d] The legal relation being complete, it cannot be repeated while it endures. On these principles the doctrine of remitter in our law is founded, as will appear from a careful consideration of section 659 of Littleton, and Lord Coke's comment thereon.

Matrimony differs from the other two sacraments of this class, inasmuch as the status created by it ceases by death of one of the parties. The reason of this is, that it is founded on a bilateral personal contract, and therefore can exist only during the life of both parties thereto. But, during its existence, it is indelible according to the Canon Law. From this principle the following important consequences arise. The species of divorce known in our Common Law as Divorce *a vinculo matrimonii* does not dissolve a valid marriage; but declares an invalid marriage void *ab initio*, by reason of some impediment of the class called *diriment*—existing before the pretended marriage was solemnized; and thus the issue are bastardized.[e] But where the sacrament of marriage is valid and complete *ab initio*, it is indissoluble by the Canon Law and the Common Law of England; though the parties may be separated by a divorce *a mensâ et thoro* for certain supervenient causes which make it improper or impossible for them to live together. This sort of divorce does not dissolve nor declare null the *vinculum matrimonii*, so that the marriage state subsists and the issue are not bastardized.[f] The principal causes of divorce *a mensâ et thoro* by the Canon Law, and the only causes allowed by the English Law, are adultery and cruelty, *gravis sævitia*, exercised by the husband against

[a] See the Decretals tit. De Sacramentis non Iterandis, lib. i., tit. xvi.; Reiffenstuel, Jus Canon., lib. i., tit. xvi.; Concil. Trident., sess. 7, can. 9.

[b] L. xlv., ff. De Regul. Jur.

[c] Instit., lib. ii., tit. xx., De Legatis, § 10.

[d] L. iii., § 4, ff. De Aquirenda vel Amittanda Possessione.

[e] Co. Litt. 235. a.; Devoti, Instit. Canon., lib. ii., tit. ii., sect. ix., §§ 123, 124, sect. xi.

[f] Co. Litt. *ibid.*; Oughton, 215.

the wife.[a] And with regard to the latter species of case, the law is slow to interfere except where cohabitation is unsafe and dangerous to the person or health of the party applying. This is laid down in the celebrated case of *Evans* v. *Evans*, 1 Haggard, Rep. 36.

Lord Coke is not strictly correct, according to the Canon Law, in his comment on Litt., sect. 380, where he speaks of divorce *a vinculo* by reason of some pre-existing impediment. That is in truth not properly a divorce, but a decree declaring that there never was any valid marriage between the parties; for, as it appears in 2 Hagg. 8, and Ayliffe, Parergon, 50, there cannot be a *divorce* without proof of a valid marriage. Such divorce is of course not *a vinculo*, but *a mensâ et thoro*. And where the sacrament of marriage is valid, and the marriage is consummated, the Canon Law permits no divorce *a vinculo*, though it allows divorce *quoad vinculum*, where (under certain circumstances) one of two heathens, husband and wife, is converted to Christianity, in which case there is no sacrament of marriage; and where the marriage is not consummated and therefore imperfect, and the parties agree that one or both of them shall take holy orders, or become professed. But this can only be by decree of the Pope himself.[b]

From the sacraments we must proceed to notice the other ecclesiastical things belonging to the same class in the Canon Law—that is to say, other spiritual things of a mixed nature. These are the offices of Divine worship; rites and ceremonies; the appointed festivals, and other solemn days and seasons; and the like.

These things are governed by a multitude of rules and regulations; some of which are part of the general Canon Law, while others are particular rules and usages, in the nature of by-laws belonging to certain churches, places, and societies.[c] They are chiefly to be found in the Rubrics of the books containing the formularies of public worship. But the Corpus Juris Canonici contains many Canons regarding these matters, especially in the fortieth and subsequent titles, as far as and including the forty-sixth title of the third book of the Decretals and in the third part (the treatise *De Consecratione*) of the Decree of Gratian.

Our plan does not permit more than a general notice of this important and difficult branch of Ecclesiastical Law. But we must not

[a] Devoti, Inst. Canon., *ubi supra*, § 153. See the tenth Book of Sanchez de Matrimonio.

[b] Devoti, lib. ii., tit. ii., sect. xi.; Lancelot, Instit. Jur. Can., lib. ii., tit. xvi., § 1; Reiffenstuel, Jus Canon., lib. iv., tit. xix., § 1, *De Divortiis*.

[c] Hericourt, Loix Eccles., part iii., chap. viii., § 3, p. 122; chap. xi. p. 141—143; Cardinal Bona de Rebus Liturgicis, lib. i., cap. ix.

pass over in silence the *divinum officium*, or *canonical hours*, which are the most remarkable part of the public services of the Church not appertaining to the sacraments; and from which the Book of Common Prayer is chiefly taken. They consist of certain psalms, hymns, lessons, and prayers contained in the Breviary, and appointed to be sung publicly every day, with certain ceremonies in cathedral and collegiate churches, and those belonging to some communities, at stated hours, the names of which distinguish these services one from the other.

Those hours are seven, and the services appointed for them are called Matins; with Laudes, Prime, Tierce, Sexte, Nones, Vespers, and a supplementary service called *Completorium*, or Complines. The chief of these are Matins and Vespers, from whence are derived the morning and evening prayer appointed by the Statute of Uniformity in the Anglican Protestant Church. The Canon Law requires all persons in holy orders to perform these seven services daily, either in public or in private.[a]

We come now to the second class of Ecclesiastical Things; namely, things sacred, *sacræ* or *sacrosanctæ*. They are things consecrated, and so dedicated to the Divine service.[b]

The analogy between this part of the Canon Law and the Civil Law must first be investigated. The Civil Law classifies things with reference to the nature of their appropriation. Thus we have seen that Ulpian says, *Totum jus consistit aut in adquirendo, aut in conservando, aut in minuendo.*[c] Justinian accordingly thus lays down the classification of things, in the commencement of the first title of the second book of the Institutes:—"Things are either in the patrimony of some one (*in nostro patrimonio*), or not in the patrimony of any one (*extra patrimonium*): for some things are common to all men by Natural Law; some are public; some belong to corporate or politic bodies; *some belong to no one*, and many to individuals. And these are acquired by each person in divers ways." The fourth class of things, *res nullius*, particularly demand our attention here. They are thus described by Justinian:—"Those things are the property of no one (*res nullius*), which are *consecrated, religious, or sacred*: for things of Divine right belong to no one."[d]

This text of Justinian contains an important doctrine of jurisprudence, which I have explained in pp. 69 and 70 of my Commentaries

[a] Devoti, Instit. Canon., lib. ii., tit. v.; Fleury, Instit. au droit Eccles. part 2, chap. ii.; Decretal., lib. iii., tit. xli., De Celebratione Missarum, cap. i.; Clementin, De Celebr. Missar.

[b] Devoti, Inst. Can., lib. ii., tit. vii., § 1.

[c] L. xli., ff. De Legibus.

[d] Instit., lib. ii., tit. i., § 7; L. i., vi., viii., ix., xi., ff. De Divisione Rerum.

on the Modern Civil Law. It is the doctrine that a thing may be really appropriated, and yet not be the property of any person. There is an example of this in our law respecting the abeyance of the freehold. Littleton says:—"If a parson of a church dieth, now the freehold of the glebe of the parsonage is in none during the time that the parsonage is void, but in abeyance."[a] Again, though the freehold of the church and churchyard is in the hands of the parson,[b] yet this is so only for the technical purpose of enabling him to protect them by bringing actions for injuries to them.[c] They cannot, correctly speaking, be called his property. The parson is made by the law a corporation to protect the church which he personates. This technical device was unknown to the Civil Law, and is unnecessary, as Savigny shows, because things may be placed *extra commercium* by being dedicated *to some purpose* without being vested *in any person*.[d] Such are the principles of jurisprudence respecting the class of things called *res nullius* in the Civil Law.

According to the Canon Law, things consecrated are in the nature of the *res nullius* of the Civil Law. Whether the Municipal Law vests them in any one or no, the Canon Law holds them appropriated to *a purpose*, and therefore separated from ordinary uses and commerce.[e]

Lancelot applies to ecclesiastical things the terms *sacræ*, *sanctæ*, *et religiosæ*, used by the Civil Law in classifying *res nullius*. But these terms must be understood in a different sense in the Canon Law. There is, however, this analogy between the classification of things *nullius* or *divini juris* and of ecclesiastical things, that in both certain things of a higher nature are called *sacræ vel sacrosanctæ*, and a class of an inferior character to the first are called *res religiosæ*.[f]

Churches occupy the first place among the *res sacræ vel sacrosanctæ* of the Canon Law. They are of divers sorts. Thus a cathedral is a church where a bishop has his permanent seat, and which is the principal and mother church of the diocese. A parish church is the church or chief church of a parish, and it has its priest, to whom is intrusted the cure of souls therein under the bishop. A collegiate church is one wherein there is a college or chapter of canons. There are also conventual churches served by monks and other regulars. Taken in its widest acceptation, the word church comprehends oratories and

[a] Co. Litt. § 646, note Hargr. Litt. § 647.

[b] Co. Litt. § 12, p. 18. b.

[c] 1 Blackst. Comm., chap. xi., §§ 5, 7.

[d] Savigny, Traité de Droit Rom., tom. ii., p. 244, Paris, 1840. And see something analogous at p. 360.

[e] Devoti, Instit. Canon., lib. ii., tit. vii., sect. iv., § 35.

[f] Devoti, Instit. Canon., lib. ii., tit. i., § 1.

chapels which are private or lesser places of worship.[a] Such are the definitions of different kinds of churches by the Canon Law.

Churches are required by the Canon Law to be consecrated according to the ritual contained in the Roman Pontifical.[b] And so the law of England takes no notice of any building as a church until it has been consecrated. Gibson, Cod. 213. But this rule of the Canon Law is subject to divers exceptions.

Altars belong to the same class of ecclesiastical things. The Canon Law requires them always to be consecrated.[c] Of the same legal nature are sacred vessels, vestments, and bells which are consecrated and set apart for the purposes of Divine worship.[d]

Having explained sufficiently for our purpose the class of ecclesiastical things called *res sacræ*, or *sacrosanctæ*, we must proceed to the next class, namely, *religious things, res religiosæ*.[e] And first, of burial places. By the Civil Law, a place became *religiosum* by the mere fact of a dead body being buried there with the consent of the owner of the land.[f] But the Canon Law requires that all places intended for the burial of Christians should be previously set apart by solemn benediction for the religious rite of Christian burial.[g] Thus they become ecclesiastical things.

The Canon Law allows every man full liberty to choose his place of burial. If he make no choice, he is to be buried in the sepulchres of his family, or in the church of the parish where he was domiciled.[h] The celebrated canon *Abolendæ* forbids the clergy to require any payment for the ground in which a person is to be buried.[i] But by ancient usage, oblations called *funeraria* are due to the parish church

[a] Devoti, Inst. Canon., lib. ii., tit. vii., § 5; *Ibid.*, sect. iii., § 32, *et seq.*, De Capellis et Oratoriis; Decretal, lib. v., tit. xl., cap. xxii.; Van Espen, Jus Eccles., tom. ii., p. 569, pars ii., sect. ii., tit. i., cap. iii., §§ 6, 7; Definition of Oratories and Chapels; Lindwood, 233, defines Oratories somewhat differently.

[b] Devoti, Inst. Canon., lib. ii., tit. vii., sect. i., §§ 16, 17; Pontificale Romanum, pars ii., tit. ii.; Gratian, pars iii., De Consecratione, Distinc. i.; Decretal, lib. iii., tit. xl.

[c] Gratian, *ubi supra;* Decretal, lib. iii., tit. xl.

[d] Devoti, Inst. Canon., lib. ii., tit. vii., sect. iv., § 25, *et seq.* As to the Relics of the Saints, see tit. viii., and Decretal, lib. iii., tit. xlv.; Fleury, Instit. au Droit Eccles. part ii., ch. viii.

[e] Lancelot, Instit. Jur. Can., lib. ii., tit. xxiv., De Sepulturis; Lancelot, lib. ii., tit. i., § 1.

[f] L. vi, § 4, ff. De Divisione Rerum et Qualitate.

[g] Devoti, Inst. Canon., lib. ii., tit. ix., § iii.

[h] Decretal, lib. iii., tit. xxviii., De Sepulturis, cap. i.; Sext. Decretal, lib. iii., tit. xii., cap. iii.

[i] Decretal., lib. iii., tit. xxviii., cap. xiii.; Van Espen, Jus Eccles., pars ii., sect. iv., tit. vii, *De vetita Exactione pro Sepulturis*, tom. iii. p. 775.

of the deceased according to the custom of the place; and one fourth, or by custom one third, part of those oblations called the *quarta funeraria* is still due though he be buried elsewhere. These oblations are called *mortuaries* in the Law of England.[a]

The Canon Law refuses burial in consecrated places to those who, during their lives, were separated from the Church, and other persons whom it is unnecessary to enumerate here;[b] though many things on this subject have been adopted from the Decretals and the Decree of Gratian into our Municipal Law.

Hospitals, almshouses for old people and orphans, and other charitable foundations, are also placed by the Canon Law among *res religiosæ*. They are of common right subject to the authority of the bishop of the diocese, unless they are exempt. And even these are (with certain exceptions) subject to episcopal visitation.[c] On this principle the statute 2 Hen. V. st. 1, c. 1, provided that the ordinary should visit all hospitals founded by subjects; though the king's right was reserved to visit, by his Commissioners, such as were of royal foundation. But Blackstone informs us that the subjects' right was in part restored by stat. 14 Eliz. c. 5, which directs the bishop to visit such hospitals only where no visitor is appointed by the founders: and all the hospitals founded by virtue of the stat. 29 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit.[d] And pious eleemosynary foundations are, by the Civil Law, subject to episcopal jurisdiction, being looked upon in the light of ecclesiastical things, such as churches and basilicæ.[e] Such are the chief points of the Canon Law regarding *religious things*.

One class of ecclesiastical things remains for consideration, namely, *Temporal Things*. They are those which serve for the sustenance of the clergy and the poor, and the providing and maintenance of whatever is requisite for Divine service. Such are tithes, oblations, and other revenues of the church.

[a] Devoti, *ubi supra*, §§ 7, 8; Van Espen, *ubi supra*; 3 Stephen, Comm. 147, &c., chap. iii.; Stat. 21 Hen. VIII. c. 6.

[b] *Sacris est canonibus institutum, ut quibus non communicamus vivis, non communicemus defunctis*, Decretal, lib. iii., tit. xxviii., De Sepulturis, cap. xii.; Devoti, lib. ii., tit. ix., § 12; Gratian, pars iii., De Consecratione, cc. 27, 28, Dist. i.; Gratian, Caus. 24, quest. 1.

[c] Devoti, Inst. Canon., lib. ii., tit. xii., § 3; Lancelot, Instit. Jur. Canon., lib. ii., tit. xxiii.

[d] 1 Blackst. Com. c. xviii., p. 482; 2 Inst. 725.

[e] See Justinian's Code, tit. De Sacrosanctis Ecclesiis, L. xxii., xxxii., xxxiii., §§ 7, 35, 42: §§ 9, 46; § i; and tit. De Episcopis et Clericis, L. xlix.; Novell. 7, cap. xii.; Novell. 123, cap. xxiii.

One general legal doctrine applies to them all, with reference to the nature of the tenure by which they are held by the clergy. It is this:—

The Civil Law allows to a slave the enjoyment of a *peculium*. It is a little patrimony, which, by the permission of his master, the slave has apart from whatever else he possesses which belongs to the master.[a] The Canon Law holds the ecclesiastical property of the clergy to be of this nature, as appears by the twenty-fifth title of the third book of the Decretals, which is inscribed *De Peculio Clericorum*. Thus, as the slave has not a real dominion over his *peculium*, so the clerk is not *dominus, the owner* of the revenues forming his clerical *peculium*. He has only the use and administration of the property, out of which he is to take what is necessary for his due and becoming sustenance; and the remainder must go to pious uses.[b]

On this principle, the ancient Canon Law required that where a clerk had no private patrimony, whatever he left at his death should return to the Church.[c] And such is the spirit of the Law as declared by the Council of Trent, though the difficulty of separating the ecclesiastical *peculium* from the private patrimony of clerks led to their being allowed by custom to bequeath by will their property, whether derived from one source or the other.[d]

It follows that the tenure of ecclesiastical property is by the Canon Law of a very special nature. It is a limited kind of usufructuary right, so far as regards the clergy. Savigny shows that, by the Civil as well as the Canon Law, the *dominium* of ecclesiastical property is vested in the community of the particular church to which it is affected, considered as *universitas*, that is to say, a juridical person.[e] This doctrine applies to the corpus of the property subject to the usufructuary right of the clergy, who also represent the church and have the administration of its property.

We may conclude that the doctrine of the Common Law, that the parson hath the entire though qualified fee of his Church,[f] is not derived from the Canon Law. The Common Law makes ecclesiastical property approximate much nearer to the nature of private property than the Canon Law.

[a] L. v., ff. De Peculio; et vid. LL. 4, 8, and 46, § 6, *eod. tit.*

[b] Devoti, Inst. Canon., lib. ii., tit. xviii., §§ 1, 3.

[c] can. Apostol. 40; Decretal, lib. iii., tit. xxv., c. i.; Gratian, Caus. 12, quest. 3, can. i.; Decretal, lib. iii., tit. xxvi., De Testam. cap. vii.

[d] Devoti, Inst. Canon, *ubi supra*, § 4; Concil. Trident., sess. xxv., De Reformat. c. i.

[e] Savigny, Traité de Droit Rom., tom. ii., pp. 266, 267, ed. Paris, 1840. And see pp. 267, 268, as to the property of pious foundations.

[f] Cro. Car. 582; Co. Litt. 67. a., 300. b., 341. a.

It follows, from the principles already explained, that as a general rule, ecclesiastical property being devoted to a public purpose, and not *in commercio*, cannot be alienated.[a] That rule however has divers exceptions.[b] Here we must conclude the second general head of the Canon Law, namely, the Law of Things; and proceed to the third and last—that is to say, the Law of Actions, and judicial proceedings.

The fundumental doctrine of the Canon Law on this subject is, that the Church, being a visible society or body politic, requires a visible constitution or form of government, without which no society of men can continue. And this government necessarily implies and includes not only the power of making general rules or laws for the members of the commonwealth, but also that of applying those laws to particular cases, and providing for their due observance. The principles of public Law require that there be in the Church, as in every other commonwealth, magistrates invested with jurisdiction to administer the Law.[c] What the nature of that jurisdiction is, and how it is exercised, we now have to inquire.

Ecclesiastical resembles temporal jurisdiction, inasmuch as the subject-matter on which both are exercised consists of persons and things. Here we see the coherence between this last part of our subject and the two others. But the Canon Law has objects differing from those of the Temporal Law, as I have already pointed out. Therefore ecclesiastical jurisdiction is exercised over persons viewed in a different light from that in which the civil magistrate regards them. And the same distinction applies to things. There are also things over which the ecclesiastical magistrate has exclusive jurisdiction. The civil magistrate cannot take cognizance of them consistently with the principles of public Law, because they do not belong to the outward order of civil society, nor affect civil rights: though, even in such matters, he may give his authority in support of that of the ecclesiastical magistrate. And this takes place where there is a church established by Law.

Of that constitution, the Chancellor D'Aguesseau speaks, where he says:—"There must be in Ecclesiastical Law a great number of matters which may be called *mixed*, in which the temporal power concurs with the spiritual, and where those two powers without being subordinate to each other ought to lend each other mutual assistance in order that, both being derived from God, they may act each in its proper way for the glory of their Author, and the happiness not only temporal

[a] Devoti, Inst. Canon., lib. ii., tit. xix., De Rebus Eccles. non Alien.; Cod. Justin. tit. De Sacrosanctis Ecclesiis, L. 14 and 17; Novell. 7, cap. i.

[b] Devoti, *ibid.* § iii.; Lancelot, Inst. Jur. Canon., lib. ii., tit. xxvii.

[c] Devoti, Inst. Canon., lib. ii., tit. i., §§ i., ii. iii.; *et vid.* Prolegom. c. i. § 6.

but eternal of their subjects." "There is consequently a double power in Ecclesiastical Law; a double authority; double legislation; double laws and judgments of two different species."[a]

Notwithstanding that concurrence of the two Laws, spiritual and temporal, in the species of civil polity to which this passage of D'Aguesseau relates, they are essentially distinct one from the other; the one belonging to a spiritual though visible society whose ultimate object is supernatural, while the other appertains to the order of civil society and the temporal welfare of its members.[b] And in like manner the spiritual or ecclesiastical and the temporal jurisdictions are separate and distinct.

I have here to explain the former considered by itself according to the Canon Law.

I have already shown, in my Reading on the Corpus Juris Canonici, that the matter contained in the second part of the Decretals is described by the word *Judicium*.[c] This head of Law corresponds with that of *actions* in Justinian's Institutes.

Justinian, in the words of Celsus, defines an action to be *jus persequendi in judicio quod sibi debetur*.[d] It is a remedy provided for obtaining the enforcement of a legal right. The canonists place this portion of the Law under the head *judicium*, because the Canon Law considers it not only as providing remedies for legal rights, but in a broader point of view—as appertaining to the public Law of the Church.

Judicium is defined to be *legitima controversiæ apud judicem tractatio et dijudicatio*. And for its constitution these persons are required—*Actor, reus, et judex*—a plaintiff or prosecutor, a defendant, and a judge.[e] These general propositions apply both to civil and to criminal causes.

Jurisdiction, in the wide sense of the word, is the public power of deciding and executing criminal and civil causes.[f] We have now to consider its nature and principal branches according to the Canon Law.

The chief order of spiritual judges by the Canon Law are the bishops, though under their supreme head the Pope, who alone has the plenitude of jurisdiction; and from them the ecclesiastical jurisdiction flows, which is vested in other spiritual judges.[g]

[a] D'Aguesseau, Œuvres. tom. i., p. 416.

[b] Devoti, Inst. Canon., Prolegom. c. i., § 7.

[c] *Judex, Judicium, Clerus, Connubia, Crimen.*

[d] Inst., lib. iv., tit. princip.; L. li., ff. De Auctionibus.

[e] Reiffenstuel, Jus Canon., lib. ii., tit. i., §§ 2—6; Voet, Comm. ad Pand., lib. v., tit. i., § 3.

[f] Voet, Comm. ad Pand., lib. ii., tit. i., § 1.

[g] Devoti, Inst. Canon., lib. ii., tit. i., § 2, and not. 2, lib. i.; Prolegom. cap. ii., § xx.; lib. i., tit. iii., sect. i.

Jurisdiction is either ordinary or delegated. An ordinary judge—*judex ordinarius*, is one who exercises jurisdiction in his own right and not in right of another, and his jurisdiction is called ordinary jurisdiction. Thus the diocesan is the ordinary within the diocese, and so is the chapter during the vacancy of the see; and inferior prelates, such as archdeacons, are ordinaries.[a] And the other prelates in the hierarchy of jurisdiction, patriarchs, primates, and archbishops, are by the Canon Law ordinaries or ordinary judges under the supreme ordinary —the Sovereign Pontiff.[b]

By a fiction of law the vicar-general or official of a prelate is an ordinary judge,[c] for he is the mouthpiece of the prelate, and therefore, as it is laid down in the Sexte, there is no appeal from the vicar-general or official to the bishop, which would be an appeal *ab eodem ad seipsum*.[d] But these magistrates cannot delegate their jurisdiction, and in this respect they are on the footing of judges delegate.

A judge delegate is one whose jurisdiction is not vested in him in his own right, but is committed to him by an ordinary.[e] He has it not from his office or dignity by law or custom, (as a vicar-general has,) but by a special mandate or commission confined to certain causes or matters.[f] And to him applies the rule *delegatus non potest delegare*, for he cannot sub-delegate.[g] But to this rule there is an exception by the Civil Law in the case of delegates of the Emperor, and by the Canon Law in that of delegates of the Pope.[h] Appeals from a delegate lie to the judge from whom his commission is derived—*a delegato ad delegantem*.[i] Such are the general rules of the Canon Law regarding ordinary and delegated jurisdiction; for the details of which, with their exceptions and applications, I must refer to the first book of the Decretals, titles XXIX. and XXXI., and the commentaries of Reiffenstuel thereon. Jurisdiction, whether delegated or ordinary, is divisible into two branches—that is to say, voluntary jurisdiction, and contentious jurisdiction.[j] The former is

[a] Reiffenstuel, Jus Canon., lib. i., tit. xxi., De Officio Judicis Ordinarii, § i., num. 2, 3, 13; Co. Litt. 96. a., 344. a.; Decretal, lib. i., tit. xxxi.

[b] *Ibid.* num. 9, 6.

[c] *Ibid.* num. 12, 27; *et vid.* lib. i., tit. xxviii., § iv. num, 76, 77; 9 Rep. 36.

[d] Sext. Decret., lib. i., tit. iv., cap. ii.

[e] Devoti, Inst. Can., lib. i., tit. ii., §§ i., ii.; Decretal, lib. i., tit. xxix.; Donelli, Comment. de Jur. Civ., lib. xvii., cap. i., s. iv.

[f] Reiffenstuel, Jus Canon., lib. i., tit. xxix., § iii., num. 12, 13, &c.; Cujacii, Comment. in lib. i.; Quæst. Papin ad L. v. De Offic. Procons., Cujac. Op., tom. iv., col. 6, edit. Mutin.

[g] Devoti, *ubi supra*, s. ii.; Cujac., *ubi supra*.

[h] L. 5, ff. De Judic.; Decretal, lib. i., tit. xxix., cap. xxvii., xxviii.

[i] L. 1, L. 3, ff. Quis et a quo appelletur; Cujac. *ubi supra*.

[j] L. 2, L. 3, ff. De Offic. Procons.

that which is exercised *inter volentes* or *in volentes*, without dispute, or opposition, or contention between or on the part of those who are the subjects thereof. It is or may be exercised not *pro tribunali*, or in the judgment seat or the bench, but *de plano*.[a] The latter on the contrary is a jurisdiction exercised *inter invitos*, or at least against the will of one party, or where something is in dispute and for adjudication between them though they submit it to the judgment of the Court. Contentious jurisdiction requires *causæ cognitio*, a judicial cognizance of the cause.[b]

Another general division of jurisdiction by the Canon Law is that which distinguishes between civil and criminal jurisdiction. The former has for its purpose the adjudication of a right or the performance of a legal action, and the latter the determination of the question whether a given person, or (in the case of an inquest) whether any and what person has violated the law, and the punishment, correction, and amendment of the offender.[c] But criminal jurisdiction in the Canon Law differs from that which belongs to the civil power, inasmuch as its extreme point of severity consists in the punishment of expulsion from the Church, whereas the temporal law inflicts corporeal punishments involving effusion of blood and even death. And the Canon Law admits of but two objects in punishment, namely, first and principally the amendment of the offender, and secondly the deterring of others.[d]

I have now sketched a general plan of the third great head of Canon Law, showing the nature of ecclesiastical jurisdiction, and the principal branches into which it is divided, as well as some of the leading doctrines belonging to those branches, and here must terminate these Readings on the Canon Law. They can give but an imperfect knowledge of that great branch of jurisprudence. My design has been to present a general and comprehensive view of the subject, with only so much of detail as seems necessary to give a clear notion of the characteristics and the spirit of that famous system, and its analogies with other parts of universal jurisprudence. And herein I have acted in accordance with my doctrine, that every portion of the legal science should be studied with reference to the other portions, and to that

[a] Cujacii Comm. in lib. i., Quæst. Papiniani ad L. 5, De Offic. Procons.; Cujac. Op., tom. iv., col. 6, 7 edit. Mutin; Devoti, *ubi supra*, § iv., see note i.; Donellus and Voet add a mixed or intermediate branch, but their distinction is more subtile than sound; Donelli Comm., lib. xvii., § 9; Voet ad Pandect. lib. ii., tit. i., § 4.

[b] Cujac., *ubi supra*; Cujac., Op. tom. v., col. 3; Voet, *ubi supra*, § 3.

[c] Devoti, Inst. Canon., lib. iii., tit. ii., § ix.; lib. iv., tit. i.

[d] Devoti, Inst. Canon., lib. iv., tit. i., § vii.

science considered as a whole. This method is best calculated for the liberal, comprehensive, and philosophical cultivation of legal studies.

You have now seen the whole scheme of Ecclesiastical Law spread before you like some noble City viewed from an eminence, displaying an imposing and magnificent spectacle, with its streets, and squares, and gardens, and edifices adapted to every purpose of its inhabitants, some venerable for their antiquity—the majestic remnants of former ages—others comparatively modern or even new, but all harmonizing and combining together into a vast whole which invites the beholder to a nearer and more complete inspection of such parts at least as his disposition or his interests may lead him to appreciate. I trust that some among you will not remain strangers or mere distant spectators of that great city of Ecclesiastical Law. You will find therein much that a lawyer, a judge, and a statesman, should be acquainted with. And you will acquire a fresh proof of what, in the course of my readings, I have often inculcated, namely, that legal studies ought to be pursued on an extended plan, and each particular branch of law should be considered not only in itself but as a part of the science of universal jurisprudence which comprises all those rules of conduct or laws whereby the human race is under Divine Providence governed.

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